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Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-943

INTERNATIONAL AIR INDUSTRIES, INC. and VEBCO, INC.,

Petitioners,

versus

AMERICAN EXCELSIOR COMPANY,

Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit, entered in the above-entitled case on August 18, 1975.

CITATIONS TO OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit is reported in CCH Trade Cases, in paragraph 60,447 and 517 F.2d 714 (5th Cir. 1975). A copy of the opinion is attached hereto as Appendix A. No opinions were issued by the District Court. The judgment of the District Court is attached hereto as Appendix B.

JURISDICTION

The judgment of the United States Court of Appeals for the Fifth Circuit was entered on August 18, 1975. The order overruling petitioner's motion for rehearing was entered on October 8, 1975. The jurisdiction of this court is invoked under 28 U.S.C., Section 1254(1).

QUESTIONS PRESENTED

I. Whether the Court of Appeals erred in holding that predatory intent cannot be proved unless the respondent's prices are below its marginal or average variable costs even though respondent:

1) attained its monopolist position through acquisition of its competitor companies;

2) was many times the size of petitioner companies;

3) engaged in industrial espionage;

4) terminated petitioner's distributorship;

5) engaged in false advertising which disparaged petitioners' product;

6) maintained higher prices in other geographic areas;

7) by-passed its other distributors to sell directly only to petitioners' customers; and

8) applied financial pressure by establishing a "hold file" on petitioners' invoices so that petitioner's cash flow position would be hurt;

and even though the management of respondent AMXCO had made it abundantly clear from their intra office correspondence what their intent was with respect to the new competition of petitioner companies, to-wit:

1) a commitment to "stunting the possible growth of Vebco" [R. - 473];

2) a recognition by respondent officers that the new pricing cuts were taking their toll and that "El Paso was American Excelsior Territory" [R. - 474];

3) a management attempt to purchase petitioner's only supply of wood and "make it rather difficult for them to continue their operation" [R. - 471];

4) a recognition by management that if petitioners were to be discouraged it must be hit "hard" or petitioner might become "entrenched" [R. - 479];

5) a statement that AMXCO's "fair share" of the new pad business was near "100%" [R. - 484]; and

6) a recognition by management that by pricing its pads low enough that petitioners could not profit it would also lock out its only other viable competition from the El Paso market [R. - 485].

II. Whether the Court of Appeals erred in holding that petitioners received a fair and impartial trial even though:

1) evidence relating to respondent's acquisition of competitor companies was disallowed;

2) evidence of the attempts to purchase petitioners' wood supply was disallowed;

3) evidence of all of respondent's pricing outside the El Paso area was disallowed even though a stipulation as to that pricing had been entered into;

4) evidence that a manager of one of petitioners' customers quoted a respondent salesman as agreeing that respondent wanted to put petitioners "out of business" was disallowed;

5) the court failed to inform the jury that the lengthy stipulation among the parties was conclusive as to the facts which were agreed to therein;

6) the court failed to inform the jury that all the elements of a Robinson-Patman claim had

been stipulated to except for the proscribed effects on competition and damage to petitioners; and

7) the district court interjected himself into the trial in such a way as to prejudice materially the petitioners' case by exclusion of petitioners' evidence continuously throughout the trial without prior objection by counsel, by stating to the jury on several occasions that petitioner's proffered evidence had nothing to do with the charges and by failing to allow petitioners to develop its testimony in an orderly manner and taking over completely the questioning of petitioners' expert witness.

III. Whether the Court of Appeals erred in holding there was sufficient evidence to support the "good faith meeting of competition defense" even though it was uncontroverted that respondent's price cutting was at least ten percent (10%) below petitioners' pricing to the same customers, that the price offered did not require a quantity purchase and that respondent had actual knowledge of petitioners' prices prior to making its price cuts.

STATUTES INVOLVED

The statutory provisions involved are Section 2 of the Clayton Act, 38 Stat. 731, Sec. 2 (1914), as amended by the Robinson-Patman Act, 49 Stat. 1526, Sec. 1 (1936), 15 U.S.C. Sec. 13 (1973), Sections 4 and 16 of the Clayton Act, 38 Stat. 731, Secs. 4 and 16 (1914), 15 U.S.C.

Secs. 15 and 26 (1973) and Section 2 of the Sherman Act, 26 Stat. 209, Sec. 2 (1890) as amended 69 Stat. 282 (1955), 15 U.S.C. Sec. 2 (1973); United States Constitution, Amendment VII. These statutes are set out in Appendix C attached hereto.

STATEMENT OF THE CASE

This was an action brought by Vebco, Inc. ("Vebco") and International Air Industries, Inc. ("International"), petitioners, to recover damages and injunctive relief under the Clayton Act as amended by the Robinson-Patman Act for price discriminations by the respondent American Excelsior Company* which injured competition in the sale of evaporative cooler pads at both the primary and secondary levels. They also sought the same relief under the Sherman Act for an attempted monopoly of the evaporative cooler pad market in the southwestern states of the United States. The seven-man jury returned a defendant's verdict on all the claims.

The Court of Appeals concluded that all the alleged points of error made by the District Court were meritless. The Court of Appeals for the Fifth Circuit also held that predatory intent could only be proved if the respondent's prices were below its marginal or average variable costs for cooler pads.

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* American Excelsior Company was the named defendant in the District Court but during the course of discovery it developed that AMXCO, Inc. was the corporate successor to that company. Throughout this petition the respondent will be referred to as AMXCO.

STATEMENT OF FACTS

1. Vebco

Vebco, Inc. is a New Mexico corporation, qualified to do business in the State of Texas and has its principal place of business in El Paso, Texas. It is the successor to a sole proprietorship established in 1950 by Vernon E. Britt, President of Vebco, and was incorporated in 1959. [R. - 132] Mr. Britt and his son, Paul E. Britt, are the principal shareholders of the company.

Vebco is presently engaged in the business of distributing certain heating and air conditioning equipment, some of which equipment it manufactures itself. [R. - 188, 189] It distributed cooler pads for AMXCO and its predecessor from 1953 through 1971. It began to manufacture evaporative cooler pads in January 1972. Its only warehouse is located in El Paso, Texas, but it has customers in all the southwestern states with the exception of Nevada. [R. - 144]

2. International

International Air Industries, Inc. is a Texas corporation with its principal place of business in El Paso, Texas. International was incorporated in 1969 for the purpose of manufacturing evaporative cooler pads and evaporative cooler covers. The original owners of International were Vernon E. Britt, Paul E. Britt and three others, but in 1970 the Britts, through Vebco, acquired control of the company. [R. - 141-142]

3. American Excelsior Company (AMXCO)

Defendant respondent, AMXCO, Inc., a corporation with its principal place of business in Arlington, Texas, manufactures, *inter alia*, evaporative cooler pads for use in evaporative type air coolers. It is a subsidiary of Texstar Company, a publicly held, diversified corporation, and markets its products nationally. It first began manufacturing cooler pads in 1953 or 1954 when it acquired two established manufacturing companies, Western Wood Excelsior in Los Angeles, California and Western Aspen Excelsior in Arlington, Texas. In 1960 American Excelsior acquired still other manufacturers of cooler pads, Texas Excelsior Corporation and Palmer Manufacturing Company in Phoenix which was AMXCO's largest competitor at that time. [R. - 108-125] In approximately the middle of 1970, AMXCO negotiated to purchase the petitioning companies, International and Vebco, but the purchase was not consummated. [R. - 403-414, R. - 213-218] Later, near the end of 1970 AMXCO negotiated to purchase its largest competitor in the Arizona, northern New Mexico and Texas Panhandle areas. Again the purchase was not consummated. [R. - 108-125]

Although AMXCO was the world's largest producer of cooler pads, [R. - 67-71] it had no competition selling in El Paso area as late as 1968. In 1968 it had no manufacturing competition anywhere in the southwestern United States. [R. - 229] It had in excess of 69% of that market each year for the next three years, however, [R. - 491] petitioners were not allowed to introduce evidence of how that market position was attained.

Robert Case, President of Southwest Industries, upon his deposition testified that American Excelsior had systematically merged with or acquired at least four companies in the cooler pad manufacturing business from the years 1953 to 1968 [R. - 108-125]. The court failed to admit evidence of any of the mergers or acquisitions apparently on the ground that it had nothing to do with the lawsuit before it. [R. - 296]

The court admitted evidence relating to the negotiations among the parties to get the petitioners out of the pad manufacturing business but evidence of the same type of negotiations between AMXCO and Southwest Industries about which Robert Case had deposed was ruled inadmissible. [R. - 436, 437]

In December 1970, just prior to the AMXCO price cutting activity in El Paso, respondent had broached the possibility of Southwest's selling out to AMXCO. Financial data was turned over to AMXCO and discussions were held between the companies in Arlington, Texas. The negotiations fell through and it was the opinion of Mr. Case that "at that particular time they were more interested in what kind of statement we had, and some sales figures and so forth, more so than they were in talking about, you know, actually getting together on a merger or a buy out." However, none of this evidence was admitted by the district court. [R. - 108, 125]

4. The relevant market

The parties agreed that the relevant product market was the evaporative cooler pad market. The cooler pad

is made of aspen wood shavings, otherwise known as "excelsior", which is then covered with a crinoline cloth. The cooler pad is one of the components of the evaporative type air cooler which is commonly used in the dry southwestern United States to cool homes, offices and industrial plants. [R. - 133, 134]

The evaporative cooler pads are inserted into the cooler, water is pumped across the pads and the air is pulled across the wet pad. As the water evaporates the air is cooled. Of course, a dry climate is essential to the efficient operation of the evaporative cooler. [R. - 133, 134]

Although AMXCO beginning in 1960 sold a machine made pad as opposed to the handmade pad manufactured by International and Vebco, it was stipulated among the parties that for purposes of the lawsuit each of the pads was of the same grade and quality and was interchangeable in its use. [R. - 67-71]

The parties disagreed, however, as to the relevant geographic market. The original complaint alleged both a geographic price discrimination by AMXCO and also local price discrimination in the El Paso, Texas — Las Cruces, New Mexico area. [R. - 1]

After the initial discovery was completed and the books and records of AMXCO had been examined, the petitioners amended their complaint and filed a supplemental complaint alleging geographic and local price discriminations and price discrimination throughout the southwestern United States. Additionally, a Sherman Act Section 2 violation of

attempted monopoly throughout the southwestern states of the United States was alleged. [R. - 6, R. - 21]

The contention of the petitioners was that the relevant geographic market was a fact question to be determined by the jury on the basis of where the parties competed or might have competed had economic forces been working freely.

Paul Britt testified that approximately eighty-five percent (85%) of Vebco's cooler pad sales were made within an approximate 250 mile radius of El Paso, which included both Tucson, Arizona and Albuquerque, New Mexico. [R. - 455]

Vebco operated its own trucks and a warehouse in Arizona was planned (but was never built because of the atmosphere created by the illegal price cutting activity of AMXCO). Vebco's ability to compete favorably would have been enhanced with such a warehouse.

Furthermore even the division manager of AMXCO agreed that Vebco could have competed in Arizona. Carl Gillespie stated:

> I was speaking in terms of the area they were to serve, that Vebco was to cover, and if they're going to upset us in Phoenix and Southern California and all of the other branches that they have, which they could do. They could very easily go in there and demoralize the market with one truckload of pads, and we should try to discourage them.

* * *

> We just — somehow we had to indicate to them we weren't going to let them do that. [R. - 431]

Petitioners requested the court to instruct the jury that the jury must

> determine the relevant geographic market; that is the area in which the petitioners and respondent were competing during the period involved in the suit. In making this determination, you may take into consideration the area in which the parties actually sold, the areas in which they attempted to sell, and finally, the areas into which they might reasonably have been expected to extend their efforts to sell in the reasonably foreseeable future. [R. - 43]

The last sentence of the requested instruction was not given. [R. - 85]

Respondent AMXCO argued that as a matter of law the relevant geographic market was the El Paso-Las Cruces trade area. Additionally, its theory was that the year 1971 was the relevant time period. Accordingly, the court instructed the jury that El Paso-Las Cruces was the relevant geographic market. [R. - 97]

Before trial a lengthy stipulation [R. - 67-71] had been entered setting out various prices charged by AMXCO throughout the southwestern United States. However, when the stipulation was to be read to the jury, petitioners learned for the first time that AMXCO had certain objections concerning the relevancy and the materiality of certain of the prices which had been stipulated. [R. - 344, 345]

Such stipulation had been relied upon by petitioners as an integral and important part of its proof. It was thought to have done away with the requirement for the admission of hundreds of AMXCO invoices which would have cluttered an already extensive record. Nevertheless, the district court ruled that all pricing outside El Paso-Las Cruces would be omitted from the stipulation. The ruling was based on the court's opinion that the case had not been "fully developed" outside El Paso-Las Cruces area. [R. - 457] But the very reason that the case had not been fully developed was because of the petitioners' reliance on the stipulation and that the court would not admit any evidence of illegal activity in any area other than El Paso-Las Cruces.

5. The interrelations of the parties and the alleged antitrust violations

The business relationship between Vebco and respondent AMXCO had been lengthy, if not entirely satisfactory. Mr. Vernon E. Britt, founder of Vebco, began distributing pads for a predecessor of AMXCO in 1953. At that time AMXCO's predecessor was making a handmade pad and had few customers in the El Paso-Las Cruces area. [R. - 132, 135-138]

Mr. Britt expanded his merchandise line from brass fittings only in 1950 to a full line heating and cooling distributor, including a large number of specialty lines such as polyethylene packaging of brass fittings and cooler accessory kits. [R. - 188, 189]

From 1953 to January, 1969, with the exception of 1956, Vebco distributed only AMXCO's or its

predecessor's pads. In 1956 Vebco had briefly manufactured its own pads from excelsior purchased from an outside source. [R. - 138]

Historically Vebco's primary customers in the El Paso-Las Cruces trade area were the discount stores. The only large discount store to whom they did not sell cooler pads was K-Mart. [R. - 254] That store was serviced by Passage Supply, an independent distributor for AMXCO. [R. - 224]

Over the years Vebco's evaporative cooler pad sales had grown from $66,750.00 in 1968 to $112,300.00 in 1972 and its sales in all lines had risen from $128,846.00 in 1961 to $885,895.00 in 1972. [R. - 347-349] From 1968 to 1970 in only one branch of AMXCO, sales of pads went from $233,442.00 to $360,458.00. [R. - 422, 423] This was only one branch of several and a branch serving a market which supposedly was not good for cooler pads. [R. - 380, 381] The El Paso branch sold as many pads in 1968 in one month as Vebco sold all year. [R. - 444a]

Although Vebco's overall profits increased in 1971, its cooler pad sales in the El Paso-Las Cruces area were down 16%. [R. - 274] Furthermore, the price cutting activity of AMXCO did not begin until the season was in full swing. When AMXCO continued its activities in 1972 Vebco's cooler pad sales were off by $17,150.00 from the previous year and $9,800.00 below 1970 sales. [R. - 350] This does not even take into account the reduced profit margins because of the reduced prices and the phenomenal growth Vebco had experienced in prior years nor the lost good will of Vebco.

AMXCO became the world's largest producer of cooler pads primarily through a series of acquisitions of smaller manufacturing concerns. Additionally, over the years it had taken certain other action which had made it less appealing for its competitors to remain competitors rather than becoming customers. For instance AMXCO penetrated the southern California market by lowering the prices of its pads to the existing manufacturers in that area so that those manufacturers would no longer manufacture pads in competition with it. [R. - 108-125] This evidence was omitted by the trial court and such action was endorsed by the Court of Appeals as being "socially and economically justifiable."

Except for direct sales to "national accounts" such as Sears Roebuck, Montgomery Ward and White's Auto, in the El Paso-Las Cruces area AMXCO marketed all its cooler pads through independent distributors such as Vebco. [R. - 28] [R. - 67-71] AMXCO's policy had been to ship cooler pads, freight prepaid, to any customer of a distributor regardless of the customer's location. Typically AMXCO's shipment would be from its warehouse nearest the Vebco customer; therefore AMXCO's cost for shipping to a Vebco customer in Arizona, for example, would not exceed its cost for shipping to another distributor's customer in Arizona, and under this policy Vebco sold AMXCO pads at competitive prices outside the El Paso-Las Cruces area. [R. - 140, 151, 152] [R. - 325, 424-425, 445-448]

AMXCO sold cooler pads to Vebco at a price of 10% off the published distributor price sheet for freight car

quantities and Vebco purchased approximately 72,000 pads from AMXCO for resale during 1968. [R. - 139, 140, 143, 145] [R. - 67-71]

Late in 1968 Vebco was advised that AMXCO would no longer ship cooler pads, freight prepaid, to Vebco's customers unless such customers were in the El Paso-Las Cruces area. The consequence of this change in policy was that Vebco's ability to make sales of AMXCO pads at competitive prices was contained within the El Paso-Las Cruces area. [R. - 140] [R. - 424-425]

As a consequence of the above change in AMXCO's policy, Vebco began to look elsewhere for a supply of cooler pads. It therefore accepted an opportunity to purchase a minority interest in a cooler pad manufacturing company to be formed by three former AMXCO employees, which company became International, a petitioner in this suit. [R. - 141-143]

In early 1969 AMXCO learned that Vebco planned to purchase pads from the new company, whereupon AMXCO's El Paso branch manager wrote Vebco as follows:

> Due to the fact that your company, International Air, has gone into the business of manufacturing cooler pads in direct competition with this company, we can no longer qualify you as a distributor of our cooler pads or other allied lines. [R. - 489]

This was followed by a radio campaign in the El Paso area to warn the public against the use of "hand-

made" cooler pads. The AMXCO radio announcements falsely indicated that the use of handmade pads would cause cooler motors to burn out. [R. - 144, 145]

As to all its distributors other than Vebco, AMXCO also then reinstated its policy of shipping pads, freight prepaid, to any customer of a distributor regardless of the customer's location. [R. - 326, 427, 445-448]

In the fall of 1969 representatives of AMXCO and Vebco met to discuss the following: 1) International's possible purchase of excelsior "mats" from AMXCO, 2) AMXCO's possible manufacture of a cooler pad for Vebco according to its specifications for sale during the 1970 season under the Vebco label, 3) AMXCO's possible purchase from Vebco of water pumps and other cooler accessories to be manufactured by Vebco under the AMXCO label, and 4) AMXCO's possible purchase of International. An agreement, later referred to as the "buy-sell" arrangement, was reached on items 2) and 3). [R. - 201-202] [R. - 397-402]

It was agreed that nothing could be done on the above item 4) while AMXCO's former employees were associated with International, but AMXCO offered to loan $20,000.00 to Vebco for its purchase of those former employees' interests in International. That offer was accepted and Vebco acquired those interests in January 1970. [R. - 201, 202] [R. - 399-403]

Negotiations with AMXCO then became more concentrated and continued throughout the year. Financial data was provided AMXCO concerning the opera-

tion. Several key employees of AMXCO including its president, D. D. Albers, were given guided tours through the International facility. [R. - 212, 213] [R. - 400-414]

After the selling season, however, and before the end of 1970 it became apparent that no agreement for AMXCO's acquisition of International could be reached. At that time a joint venture between Vebco and AMXCO was proposed whereby a third company would be formed. No agreement was reached and late in 1970 it was agreed that the buy-sell arrangement would continue through the 1971 season. [R. - 400-414]

Paul Britt informed the AMXCO representative that International would be producing most of the Vebco pads in 1971 and would purchase only five freight cars of pads from AMXCO during the 1971 season. [R. - 216-219]

AMXCO then began to exert financial pressure on Vebco. Although the "buy-sell" agreement required AMXCO to pay for the Vebco goods it purchased within twenty-five days of the invoice date, in late 1970 and early 1971 AMXCO refused to pay according to the agreed terms. The putative reason was that AMXCO was concerned about the two carloads of pads carried over by Vebco from the previous year which had not yet been paid for, even though the local AMXCO manager had previously agreed that the payments would not be due until June 1971. [R. - 324] At the same time, AMXCO personnel were trying to get Vebco to take delivery of three additional carloads with a June 1971 billing. [R. - 147] [R. - 328, 335]

In early 1971 and late 1970 Vebco representatives made their usual early season calls on the El Paso-Las Cruces area discount stores, which stores had traditionally been Vebco's primary customers in this area. The price quoted was 10% off the Vebco price sheet* for a trailer load of pads and 5% off for a "bob tail" load. Substantial sales orders were obtained. [R. - 222, 223]

In late January 1971, Vebco dropped its price to a 14.5% discount, to meet competition in Las Cruces from AMXCO. [R. - 149] [R. - 225] As it turned out the information the price change was based upon that AMXCO was selling direct to Surplus City at a discount of less 10%, less 5%, a price which Vebco was meeting was incorrect, but only to a certain extent. It was not AMXCO who was making the offer but one of its distributors, West Texas Wholesalers out of Abilene, Texas. [R. - 283, 284, 285, 365] Nevertheless, Vebco did lower its price an additional 5% not only in Las Cruces but in El Paso, the reason being that the Las Cruces store owner also had a store in El Paso. [R. - 263] At that time K-Mart placed an order for Vebco pads.

Contrary to the Court of Appeals' opinion, at no time did Vebco ever offer a price below that of AMXCO's. At that time, of course, AMXCO was selling only to distributors (including Vebco itself) and national accounts.

In February 1971, Mr. Carl Gillespie, the division manager of AMXCO who was in charge of the El Paso

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* The Vebco and AMXCO prices from the price sheets used during this period were identical.

area came to El Paso and "balanced" the accounts of the two companies. His report concerning that El Paso meeting concluded that the "problem of what would be the best route to take to accomplish the one matter of most interest to us, that being that we want our pads to be the pads that are being sold at the dealer level in El Paso" should be solved in March. [R. - 482-483]

On March 1, AMXCO requested Vebco's order for the remaining three of the five carloads of pads which Vebco had indicated it would purchase from AMXCO in the 1971 season, but Vebco did not place the order. [R. - 328, 331]

Immediately AMXCO determined to bypass its El Paso distributors and sell directly to the discount stores. [R. - 328, 329, 332]

On March 2, 1971, Vebco began to receive calls from its various discount store customers that AMXCO was offering to sell direct to them for the first time and at a discount of twenty-five percent (25%), without regard to quantity purchased. [R. - 229]

The management of Vebco conferred and decided that if the AMXCO price could be verified, Vebco would meet the 25% discount to avoid a loss of sales. A Vebco salesman was immediately dispatched to the various stores with instructions to pick up AMXCO price sheets from the various store buyers to verify the offered discount. Upon verification of the price Vebco informed the stores that it would meet the 25% discount of AMXCO. [R. - 230] and as a result none of the customers switched to AMXCO at that time.

Next AMXCO reduced its prices to the El Paso-Las Cruces area discount stores to a discount of 32.5%. An AMXCO representative testified that they had no idea what the market price was at the time and that the decision to lower the price was done solely because they had made no sales at the less 25% price. [R. - 322]

However, several of the other AMXCO employees testified they knew that they lost the K-Mart account at "three fives" off or "15%" off. [R. - 327] AMXCO's primary distributor in El Paso, Bill Paschich, had given them that information. It is clear that at the time Vebco offered the less 10%, less 5% discount to K-Mart, Vebco was bidding against itself. [R. - 272] In fact Paschich testified that his only offer to K-Mart was less 3% in February, which was made after the Vebco offer of less 10% less 5%. [R. - 308-311] Furthermore, AMXCO knew that the large majority of Vebco inventory had been purchased at a 23.5% discount.

Frank Turner, El Paso branch manager for AMXCO, testified that no one from AMXCO asked for substantiation of any competitors' price, only whether AMXCO's price was "competitive." It was later developed that "competitive" was the jargon of the trade meaning "better." [R. - 316]

One of the considerations allegedly used in setting the initial AMXCO price cut was Southwest Industries price to Gibson's Discount Store but Gibson's did not even have a store in the area at that time.[R. - 334]

Additionally, it is undisputed that Paul Britt wrote AMXCO a letter March 8, 1971.[R. - 463] stating exact-

ly what the Vebco price was. He testified that later he told both Turner and Webb that Vebco would continue to meet the AMXCO prices to retain its customers. The testimony stands uncontroverted.

On or about March 15, 1971, upon receiving information that AMXCO had reduced its price another ten percent (10%), Mr. Britt, in addition to dispatching his salesman to collect additional AMXCO price sheets, requested Surplus City to purchase pads at the AMXCO price as further verification. Pads were purchased at that price and a copy of the invoice was given to Mr. Britt as proof of the market price. [R. - 235]

Vebco again informed its customers it would meet the AMXCO price of less 32.5%. However, this was possible only for approximately two weeks and on March 29, 1971, it was necessary for Vebco to go back to the less 25% discount of March 2. [R. - 238] Upon informing Vebco's customers on March 29, 1971, that it could not continue the additional 10% reduction it was discovered that AMXCO had dropped its price by yet another 10% discount, making its price a discount of 39.25% without regard to the quantity ordered. [R. - 239] [R. - 315]

After March 29 Vebco began to lose sales to AMXCO, with the effect as shown by the reproduction of petitioners' Exhibit 19 in the Record at 464.

In March 1971, at the time AMXCO was offering pads to Vebco customers at a 32.5% and 39.25% discount these were the lowest AMXCO prices in the nation. At the same time AMXCO was offering pads to Vebco

customers at a 32.5% discount, it was offering pads to others in the El Paso-Las Cruces area at discounts ranging from 10% to 23.5% [R. - 67-71]

On March 16, 1971, at the request of AMXCO's president, D. D. Albers, Mr. Gillespie reviewed and formulated "an up-to-date opinion of the competitive situation." [R. - 485-487] His conclusions were that:

> Vebco has become a real competitor in the El Paso area,

and that

> Loss of any sales to Southwest Industries or Vebco, although they may prove to be non-profitable to them, will result in reduced production requirements . . . which will increase unit cost of production.
>
> I would conclude that we cannot afford the luxury of being complacent, unless we have made plans to correct the situation in the coming season. I am not at all sure what approach is proper; retain as much profit as possible this season with a revised program for next season as opposed to taking a real "bath" right now while making use of available plant production at Englewood in the months of April, May and June.

Among his recommendations were the following:

1. Offer prices in El Paso low enough to insure that Vebco cannot profit from competitive priced sales. Stock our warehouse in El Paso "to the brim" to insure ability to deliver promptly.

   A. A side benefit would be that Southwest Industries would be "locked out" of the El Paso Market area.

   B. Another side benefit would be the added production requirements for the Englewood Plant.

2. Continue to police all possible Southwest Industries customers to apply pressure by meeting their offerings as they become evident, on a case to case basis.

3. Begin planning for a change in sales policies for the next season to "up date" our approach to sales through distributors to be compatible with a program of direct sales to all large discount and chain groups.

One day later Gillespie wrote another memorandum to his Division Sales Manager, June Morris, re "Cooler Pad Sales Approach in El Paso." [R. - 472-473] Some of his comments were:

> Probably we should also think of what benefits we might derive from localizing this price struggle as much as possible. If Vebco is hard pressed to supply the local customers in

El Paso and perhaps Las Cruces, they certainly will not be too interested in spreading out to Tucson and Phoenix.

June, if we are committed to a program of stunting the possible growth of Vebco and keeping our foot in this quite sizeable cooler pad market, then the real question we have is just what price do we need to determine as our lowest price level. Should it be the 50¢ figure for a No. 1 cooler pad covered, or should it be perhaps even a little lower. Since the season is just about ready to break, I would think that we need to establish whatever price is now determined, at once, and then let the chips fall where they may.

Finally, on April 11, 1971, Gillespie sent a congratulatory note [R. - 474] to Frank Turner, El Paso Branch Manager, stating:

Looks like we may be making our point, El Paso is American Excelsior Territory, with or without distributors. When it is all over, we than can look at patching up our distributor relations. We still prefer distributors but times seem to be changing. Keep the pressure on.

In late March 1971, the amount due from AMXCO to Vebco under the buy-sell arrangement was overdue by $18,000.00. [R. - 240] It was later determined that this was because the Vebco invoices were placed in a "hold file." The "hold file" was a means by which AMXCO

controlled the Vebco account in such a way that it was assured that Vebco invoices were not paid until Vebco's indebtedness to AMXCO was sufficient to be offset — even though none of the Vebco indebtedness was due and payable until June 1971. [R. - 241-243] [PX - 76] [Tr. Vol. III - 1152]

On September 24, 1971, in a continuation of the AMXCO espionage program established with respect to petitioners' operations, June Morris, AMXCO sales manager, wrote a memorandum to the AMXCO president, D. D. Albers, dutifully reporting information concerning the source of Vebco's wood supply. Items covered in the report were 1) the supplier's name, address and phone number, 2) cost of the timber, 3) method of payment, 4) freight cost and 5) quantity contracted for. [R. - 467]

An elaborate scheme was concocted whereby AMXCO would request the contractor to write a letter requesting petitioners to pick up their wood by a certain date or it would be sold to other parties. A copy of the letter was to be made available to AMXCO for its protection in the present lawsuit. After the expiration date the contractor would then write to AMXCO to offer the wood, thus giving the misleading appearance that it had all been the contractor's idea rather than AMXCO's. [R. - 468-469]

This plan did not get off the ground as AMXCO's further contacts with the supplier indicated an excellent relationship between Vebco and the contractor. Nevertheless, it was agreed between AMXCO personnel to attempt to buy the contractor's "total output of wood."

> This would not only relieve the pressure on Englewood and Cedar City to supply wood to Fresno, but it would also deprive Vebco of their present source of wood and possibly make it rather difficult for them to continue their operation. [R. - 471]

The activity could hardly have been more blatant and yet, the trial court ruled the memoranda inadmissible on the grounds of irrelevancy and immateriality.

The court stated at page 1111 of the transcript:

> There was nothing in there — they said — if they don't want the wood, we'll buy it. That's all right . . . it was all above board.

The Court of Appeals stated that the excluded memoranda were "only a minor piece of evidence, highly unlikely to change the result."

After March 1971, when AMXCO had obtained Vebco customers by lowering prices beyond what Vebco could go, AMXCO began to raise its prices. Former Vebco customers, to whom AMXCO offered 32.5% and 39.25% discounts in the 1971 season, were offered discounts of only 25% to 27.1% for the 1972 season which were, nevertheless, lower than the prices offered to buyers other than Vebco's customers. [R. - 67-71]

REASONS FOR GRANTING THE WRIT

1. Sales below cost are not an essential element of proof in making out a Robinson-Patman, Section 2(a) violation.

During the trial of this case no attempt was ever made by petitioners to prove that respondent was selling cooler pads in the El Paso area below its cost. An effort was made, however, to prove that respondent's prices outside the area were well in excess of the prices being charged by respondent in the El Paso area.

A lengthy stipulation was entered between the parties which set out all the prices respondent charged its various customers in other geographic areas upon which petitioners were relying to make out their case of geographic price discrimination as well as the intent to monopolize. However, at the end of the trial just before the stipulation was read to the jury, respondent offered objections to the stipulation and the district court omitted all prices outside the El Paso area.

The Court of Appeals ruled that because there was a general stipulation that respondent's prices outside the El Paso area were different, and because there was other testimony that the prices in the El Paso area were lower, the exact prices were irrelevant and immaterial.

Such a holding completely disregards the fact that the prices being charged in El Paso were the lowest in

the nation and that most of the cities whose pricing was omitted were closer to the respondent's factory than was El Paso and therefore should have been lower, not higher. Additionally without the total price differential being presented, the full impact of the severity of respondent's actions were lost upon the jury.

Furthermore, the Court of Appeals held that "a price differential alone would not show predation; unless AMXCO was selling below marginal cost, it would have no need of aid from other markets and the dollar figures elsewhere would therefore be irrelevant." [App. 26a-27a]

The Court of Appeals [App. 19a] had previously explained that

> . . . even if a monopolist is price discriminating, we will not infer damage to competition as a matter of law if the firm is charging a short-run, profit-maximizing price (above average variable cost) in the market in which it faces competition. And, even if its price is below this level, we will not infer damage to competition if the firm's price discrimination has beneficial effects or insignificant effects in the competitive market. In short, in order to prevail as a matter of law, a plaintiff must at least show that either (1) a competitor is charging a price below his average variable cost in the competitive market or (2) the competitor is charging a price below its short-run, profit-maximizing price and barriers to entry

are great enough to enable the discriminator to reap the benefits of predation before new entry is possible.

Based upon the Court of Appeals same reasoning vis-a-vis below cost sales, the court held it was unnecessary to construe the "may be" language of the Robinson-Patman Act* and cited *Areeda and Turner, Predatory Practices under Section 2 of the Sherman Act*, 88 *HARV. L. REV.* 697, 727 (1975). In other words the Court of Appeals has ruled that unless there is below cost selling the "incipiency" sections can have no force or effect.

Adoption of the predatory pricing standard enunciated by the Court of Appeals could well spell the end of actions under the Robinson-Patman Act and would certainly discourage private treble damage actions. Such a ruling conflicts with this court's holding in *Utah Pie Co. v. Continental Baking Co.*, 386 U.S. 685 (1967).

Furthermore, this is the first reported opinion wherein such an economic analysis has been used. Such analysis must necessarily have serious adverse precedential effect on future enforcement of the antitrust laws. It conflicts with this court's opinions in *Anheuser-Busch, Inc. v. F.T.C.*, 363 U.S. 536 (1960) and *Moore v. Mead's Fine Bread Co.*, 348 U.S. 115 (1954).

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* ". . . where the effect of such discrimination may be substantially to lessen competition . . ." 15 U.S.C. § 13(a).

2. The evidence of predatory conduct was overwhelming so that the proscribed effect upon competition was proved conclusively.

The Court of Appeals ruled that certain types of predatory conduct on the part of respondent would enable petitioners to show the proscribed effect upon competition to make out a Robinson-Patman. Section 2(a) violation. It then proceeded to examine one action taken by respondent which the court considered the only one to have merit with respect to the predatory intent of respondent.

Carl Gillespie, Division Manager, had written a memorandum to the Division Sales Manager stating a desire to "localize this price struggle as much as possible" and a commitment "to a program of stunting the possible growth of Vebco." [R. - 473]

The Court of Appeals smoothly passed two other items — the tour of the respondent representatives through the Vebco facilities on the pretext that respondent was interested in purchasing the company and the termination of the petitioners' distributorship, both in 1969 and 1971 when petitioner became a competitor.

The Court of Appeals made no mention whatsoever of the following predatory conduct and evidence relating to the predatory intent of respondent:

(a) The branch manager of the respondent checked the supply of wood of petitioner periodically and on at least one occasion, en-

tered petitioner's plant unannounced and without permission to inspect the facilities and reported his findings to his superiors.

(b) The respondent engaged in a false radio advertising campaign disparaging petitioners' product.

(c) The respondent's price cuts were made only to the customers of petitioners. In no other instances were sales made direct without going through its regular distributors.

(d) Recognition by respondent's management that its price cuts were taking their toll and its low prices would keep petitioners from profiting and lock out of El Paso the one other existing competitor, and statements that "El Paso was American Excelsior territory," "keep the pressure on," that the situation was "war," that petitioners must be hit "hard" or they would become "entrenched," and that AMXCO's "fair share" of the new business was "100%."

Furthermore, because petitioners and respondent had been buying and selling to each other, respondent was presented with an opportunity to exert financial pressure on petitioners by withholding payments of its invoices. Respondent established a "hold file" of petitioners' invoices so that petitioners' cash flow position was hurt. Finally evidence was presented that the supplier of crinoline, a necessary ingredient

to making cooler pads, was informing respondent of prices on crinoline quoted to petitioners and assuring them that it would not lower its price to petitioners. [R. - 465-6]

Additionally the trial court failed to instruct the jury that the proscribed effect upon competition could be inferred from predatory conduct, although requested to do so by petitioners.

Other evidence relating to predatory conduct and intent was kept from the jury by the trial court and will be considered, *infra*.

To hold that the above described conduct is not sufficient to a holding that the requisite substantial adverse effect upon competition may exist creates a conflict between the Fifth Circuit and Fourth and Sixth Circuits. *See Maryland Baking Co. v. F.T.C.*, 243 F.2d 716 (4th Cir. 1957) and *E. B. Muller & Co. v. F.T.C.*, 142 F.2d 511 (6th Cir. 1944).

3. The relevant geographic market is a fact question and is to be ascertained by considering the area in which the competitors actually sold, the areas in which they attempted to sell and the areas into which they might reasonably have been expected to extend their efforts to sell in the reasonably forseeable future.

Although the trial court instructed the jury that the relevant market was where the parties compete, the jury was also instructed that "the relevant market in

this case is the so called El Paso-Las Cruces market for evaporative cooler pads. That is the relevant geographic area involved in this case." [R. - 97]

At every turn the court failed to admit evidence of the respondent's illegal activities outside the El Paso area. Such failures were culminated by the heretofore described omissions of respondent's prices in other areas.

It was clear from the petitioners' pleadings that they alleged an attempted monopoly of the cooler pad market in all of the southwestern states.

Failure to allow evidence of the illegal activity of respondent in those other areas and instructing the jury that as a matter of law the relevant geographic market was El Paso-Las Cruces goes against the well reasoned rule established in both *United States v. Grinnell Corp.*, 384 U.S. 563 (1966) and *Swayne Co. v. Sunkist Growers, Inc.*, 369 F.2d 449 (9th Cir. 1966) cert. den. 387 U.S. 932 (1967).

4. The means and methods by which a monopolist obtains its market position and its stated predatory intent toward its smaller, less well financed competition may prove the requisite specific intent to attempt to monopolize a particular market.

The Court of Appeals' opinion with respect to the share of the El Paso market held by the parties to this suit is incorrect and not supported by the record. Petitioners' share of and sales in the El Paso market

decreased in 1971 — not increased. Furthermore, AMXCO's sales in El Paso increased from year to year from 1968 through 1971 — contrary to AMXCO's Exhibit D-O. The only way AMXCO was able to give such appearance was by using sales figures that included the entire state of New Mexico as well as El Paso. AMXCO's strongest regional competition was located in northern New Mexico. In reality AMXCO's accounting records relating to El Paso showed an increase each year. [Tr. - 1125, 1126] Vebco's sales in El Paso actually decreased in 1971 by 16%. [R. - 274] AMXCO's Exhibit D-O also contains duplicate AMXCO pad sales in the petitioners' sales figures which causes an overstatement of their market share for each of the years in question. [Tr. - 1118, 1119]

Although AMXCO was the world's largest producer of cooler pads. [R. - 67-71] it had no competition selling in the El Paso-Las Cruces area as late as 1968 and it had in excess of 69% of that market each year for each of the next three years. [R. - 491] petitioners were not allowed to introduce evidence of how that market position was attained.

Robert Case, President of Southwest Industries, upon his deposition testified that American Excelsior had systematically merged with or acquired at least four companies in the cooler pad manufacturing business from the years 1953 to 1968. [R. - 108-125] The court failed to admit evidence of any of the mergers or acquisitions apparently on the ground that it had nothing to do with the lawsuit before it. [R. - 296] But clearly the method by which a defendant attains a dominant position in a market is relevant to an attempted monopoly charge.

Although such acquisitions when considered in and of themselves arguably do not indicate an illegal attainment of monopoly power, when considered with other evidence that AMXCO had negotiated to purchase its largest competitors, petitioners and Southwest Industries, the conclusion is inescapable that such methods were part and parcel of AMXCO's method of keeping or attempting to keep the cooler pad market to itself.

The court admitted evidence relating to the negotiations among the parties to get the petitioners out of the pad manufacturing business but the same type of negotiations between AMXCO and Southwest Industries about which Robert Case had deposed were ruled inadmissible. [R. - 436, 437]

In December 1970, just prior to the AMXCO price cutting activity in El Paso, respondent had broached the possibility of Southwest's selling out to AMXCO. Financial data was turned over to AMXCO and discussions were held between the companies in Arlington, Texas. The negotiations fell through and it was the opinion of Mr. Case that "at that particular time they were more interested in what kind of statement we had, and some sales figures and so forth, more so than they were in talking bout, you know, actually getting together on a merger or a buy out." However, none of this evidence was admitted by the district court. [R. - 108, 125] even though industrial espionage is evidence of predatory intent.

In conjunction with the same type "negotiations" between petitioners and AMXCO it would have estab-

lished a method of operation reflecting on its intent to monopolize. Because the jury did not have the benefit of knowledge of the Southwest negotiations it could easily have been led to the conclusion that AMXCO's negotiations to get Vebco "out of the pad business" by paying "for some blue sky" [R. - 488] was no more than an innocent attempt to "help out" Vebco.

When AMXCO made the decision to penetrate the southern California market with its cooler pads, there were several large cooler pad manufacturers servicing that particular market area. Rather than compete for the various accounts, AMXCO's approach was to offer the existing manufacturers a price low enough to make it worth their while not to continue to manufacture cooler pads. [R. - 108-125]

Again, the court would not admit the evidence and ruled the stipulation relating to AMXCO prices to those companies irrelevant.

All attempts by the petitioners to extend the factual inquiry at the trial to any area outside of El Paso-Las Cruces were met with similar rulings by the trial court.

The petitioners attempted to admit the deposition testimony of Tom Webb, AMXCO salesman, regarding AMXCO's sales tactics in the Midland-Odessa area but the court sustained the respondent's objection [R. - 320] as being outside El Paso-Las Cruces. The same

was done with the Amarillo area. Every step along the way the court made it abundantly clear that it considered El Paso-Las Cruces as the only relevant location. Further, at one point the court indicated he wanted only evidence of actions by the parties to the lawsuit and involving none other. [R. - 298]

Such an approach ignores the fact that AMXCO's action toward its other competitors may and did directly affect the competitive situation with petitioners and more particularly would have established a course of conduct reflecting directly on its intent to monopolize the cooler pad market throughout the southwestern United States.

To the same effect was the omission of the respondent's attempt to buy petitioners' wood supply. *See* Statement of Facts, *supra*.

Additionally, the trial court, *sua sponte*, refused direct evidence that respondent's intent was to put petitioners out of business.

Mr. Manuel Gomez, a manager of one of the El Paso Feed Mart stores, testified that at one point in March 1971, a representative of AMXCO made a sales call on his store on Montana Street to sell cooler pads. Following is the testimony elicited:

> "Q. Could you tell us the circumstances and what happened at that particular call that you had in 1971, sir?
> "A. My assistant and myself were working at the time, and this representative of American

Excelsior wanted to talk to us, and then he said he wanted to do business with us, and at that time I told him that we had an authorized source, but I would listen to his offer. I asked him what his prices were, and he quoted a price of less 25 per cent from the listing, and I asked what prices he had on his listing, and I was comparing them with the present sheet that I had from VEBCO. The listing prices were the same. In other words, he was asking — he was quoting us 25 per cent off.

"Q. The same price?

"A. Of the same list price.

"Q. All right, sir.

"A. Which, in turn, I told him I would have to relate all the information to the buyer.

"Q. Sir, did you make any comment to him at that time concerning your view of that price?

"A. Yes, I did. I asked him if he was trying to run VEBCO out of business.

"Q. Was there any response to that, sir?

"A. He said, "Yes."

"THE COURT: Disregard that; strike that. That's a voluntary conclusion on his part. He can tell what happened, but —

The trial court stuck to its ruling on the grounds that the respondent salesman could not be identified by name.

Again the Court's excluding such pertinent testimony on intent, and effectively on his own motion, requires reversal of the case.

Nevertheless the Court of Appeals upheld all these rulings by the trial court on the grounds that if error at all, they were harmless and had no effect upon the substantial rights of petitioners.

Such a ruling misapprehends the difficulty of proving the "specific intent" necessary to an attempted monopoly charge and failure to admit all relevant evidence on such an important question conflicts with the rule established in *American Tobacco Co. v. United States*, 328 U.S. 781 (1946); *Lorain Journal Co. v. United States*, 342 U.S. 143 (1951); *Continental Ore Co. v. Union Carbide and Carbon Corp.*, 370 U.S. 690 (1962); *United States v. Griffith*, 334 U.S. 100 (1948); *United States v. Pullman Co.*, 330 U.S. 806 (1943); *Standard Oil Co. of New Jersey v. United States*, 221 U.S. 1, 46, 47, 75 (1911); *United States v. Reading Co.*, 253 U.S. 26, 43-45 (1920).

5. Injury to only one competitor is sufficient to prove a substantial adverse effect upon competition especially when no other competitor could have filled the competitive void created by the destruction of that one competitor.

During the relevant period there were only three competitors in the El Paso area — petitioner, respondent and Southwest Industries ("SWI"). SWI started its business in 1970 and respondent started its manufacturing in 1969. Using AMXCO figures [R. - 491] the market shares were as follows:

	AMXCO	*VEBCO*	*SWI*
1968	100%	0%	0%
1969	77.43%	22.57%	0%
1970	73.27%	23.55%	3.18%
1971	69.05%	26.92%	4.03%

As pointed out previously the Vebco figures included all the AMXCO pads it sold so that the Vebco percentages were overstated considerably. Also the accounting records of AMXCO relating to the El Paso branch sales showed an increase of sales in each of the relevant years while Vebco sales in El Paso dropped 16% in 1971.

Nevertheless the Court of Appeals held that Defendant's Exhibit D-O represented the true picture.

Petitioners have not to this day been able to return to its former level of business in the El Paso area and SWI has lost the only customer that it ever had in El Paso. Yet, because petitioners never closed their manufacturing doors and the court found no predation — only innocent competitive activity — the Court of Appeals ruled that a mere loss of profits and a shift of customers were not enough to prove a substantial adverse effect upon competition.

It is clear, however, that the filing of the present lawsuit in June 1971, conditioned the respondent's activity in the market. Furthermore it continued to sell to the discount stores and national chains (retailers), Vebco's old customers, at prices lower than it offered to its distributors.

To hold that in such a market competition there was no reasonable possibility of competitive injury conflicts with the rule established in *Klor's, Inc. v. Broadway Hale Stores, Inc.*, 359 U.S. 207 (1959).

6. Evidence of damage to petitioners occurring during the post complaint period tended to show the adverse effect upon competition and should not have been omitted.

The petitioners filed a supplemental complaint in July 1972, and the trial was held in June 1973.

Paul Britt attempted to testify concerning the 1973 post-complaint market situation and Vebco's sales and margins figures, but the trial court excluded such evidence on its own motion.

Such information should have been admitted to show the lasting effect the anticompetitive activities of respondent had had upon the petitioners and to support the projections of the expert witness relating to damages. Such failure abrogates the rule established in *A. C. Becker Co. v. Gemex Corp.*, 314 F.2d 839 (7th Cir. 1963) cert. den. 375 U.S. 816 (1963) and creates a conflict in the circuits.

7. When there is undisputed evidence that a price cutting, large, national seller is aware of its small, local competitors' prices but nevertheless cuts its prices to only the local competitors' customers by ten percent (10%) the good faith meeting of competition has not been proven. On the contrary such conduct is predatory.

This case is not only a "primary line" Robinson-Patman case as the Court of Appeals suggested but it is also a "secondary line" case in that Vebco was a purchaser of and distributor of AMXCO cooler pads in all the years complained of with the exception of 1972.

The stipulation entered into between the parties shows the widespread disparity between the prices of the AMXCO cooler pads both in other southwestern states and in the El Paso area. No attempt was made by AMXCO to prove that any of the disparities were in existence because of any "good faith meeting of competition" with the exception of those of the 1971 season. Even then no effort was ever made to justify the discrimination between the independent distributors and the retail discount trade.

It was AMXCO's theory that the relevant market was the discount trade in El Paso-Las Cruces, that no prices outside that area were relevant and even the discriminatory prices offered to the various classes of trade in El Paso-Las Cruces were not relevant. [R. - 449-56]

With that background, nevertheless, AMXCO's personnel did testify with respect to their price cutting activities in 1971 and attempted to justify it for business reasons other than the "good faith" meeting of competition.

They testified that the factors relevant to their setting cooler pad prices were 1) quantity purchased, 2) from where they are delivered (local warehouse or factory), 3) the existing "competitive situation" and 4) the

class of trade the customer serves. [R. - 336, 378-379, 421] It was developed that the "competitive situation" was no more than what it takes to get the business in a given locale.

AMXCO personnel also testified it was Vebco who made the first illegal price cut. Although in January 1971, Vebco dropped its prices to a discount of 14.5% off list price, such price was not below the AMXCO price being offered at the time. Prior to that date and for a short time thereafter AMXCO sold its cooler pads only to independent distributors, and some chain stores such as Sears. The record shows conclusively that AMXCO's price to its primary independent distributor in El Paso, Passage Supply, was 23% below the list price. [R. - 69] Only one distributor, R.S.I., in the El Paso area received a higher price from AMXCO than the 14.5% discount price Vebco was offering, and that distributor received only a 10% discount apparently because it only purchased approximately seven percent of the dollar volume that Passage Supply purchased. AMXCO's price to Sears was 19% off the list price. Even if it was not AMXCO who made the price cut in January 1971, nevertheless, AMXCO did initiate the illegal price cutting in March 1971. Furthermore the offer of the 14.5% discount by Vebco to K-Mart was made long before Passage Supply called on K-Mart in 1971 and could not be construed to be cutting Passage's price even if K-Mart were to be considered AMXCO's customer. The first illegal price cutting in the El Paso market occurred on March 2, 1971 by AMXCO when knowing from its own distributor, Passage Supply, [R. - 327] what price it would take to beat (not meet) Vebco's price, it reduced

its price 10% below Vebco's prices and required no volume purchases to obtain that price.

Furthermore it is clear from the record that at least some of the AMXCO personnel knew exactly what was going on. Immediately after the initial price offer of a 25% discount, Paul Britt wrote AMXCO's Pico Rivera division manager to thank June Morris for "the lesson in salesmanship (find out what the competition is and cut the price 10%)." [R. - 463] The owner of AMXCO's largest independent distributor told them it would take "three fives" off to get the K-Mart business. [R. - 308] After AMXCO began selling direct, Paul Britt told both AMXCO's salesman and branch manager that Vebco would meet AMXCO's price cuts and that Vebco would retain the business [R. - 233, 237, 237]. Every discount store buyer except one testified that the AMXCO people knew what Vebco's price was and Vebco was merely meeting each subsequent cut of AMXCO's. Furthermore, even the division manager, Gillespie, testified that Turner and Paul Britt had told him on many occasions that the El Paso discount trade were customers of Vebco. [R. - 432-33]

Not only was it made undisputedly clear that AMXCO was not in "good faith" in its price reduction but it never merely met "an equally low price" of a competitor which is a prerequisite to relying on the good faith defense. Nevertheless the Court of Appeals held the "good faith meeting of competition" defense was proved. Such a holding is adverse to this court's opinion in *A. E. Staley Mfg. Co. v. F.T.C.*, 324 U.S. 746 (1945).

8. The reason respondent received a jury verdict was the attitude expressed by the court

toward certain evidence presented by petitioners as well as the court's failure to allow the expansion of the case to its proper limits.

The district court's participation in the trial of the case was in marked contrast to his pretrial participation and his bland instructions to the jury with regard to the evidence. Clearly the court's comments on particular items of evidence sought to be introduced by petitioners, his numerous admonitions to "move on" and "not" to "get into that" as well as his objections *sua sponte* to various attempts by petitioners to develop certain evidence were an abuse of discretion, prejudiced the petitioners' case and require reversal.

During the course of the trial the judge interrupted the questioning by the attorneys no less than one hundred eighty-seven times. [R. - 131] These interruptions were gratuitous in that the opposing counsel had not first objected to the proceedings or what was being said at the time.

Of those one hundred eighty-seven interruptions, one hundred fifty-one were at times when counsel for the petitioners was interrogating the witnesses. Only nine of the total interruptions worked even conceivably to the detriment of the respondent.

The court's exclusion of competent evidence tending to prove the petitioners' charges are complained of and argued in other sections and will not be repeated except to say that of all those exclusions, 1) mergers and acquisitions, 2) the negotiations to purchase

Southwest Industries, 3) activity in other areas, and 4) the penetration of the southern California market were first objected to by the district court who was then followed by AMXCO's objections on some of the questions.

One of the most exasperating aspects of trial of the case was the repetitive comments of the court that certain testimony had "nothing to do with it" or "I don't think that's material." Examples of the evidence and comments thereon by the court are many. Throughout the trial as stated elsewhere, petitioners attempted to prove the specific intent to monopolize. Such proof necessarily required a wide range of evidence relating to the many facets of AMXCO's activities. Nevertheless at one point when counsel for petitioners was attempting to delve into AMXCO's receipt of information from a crinoline supplier regarding Vebco's orders of crinoline (a necessary ingredient to make a cooler pad), the following took place:

> "Q Are you telling me it is a normal situation for one of your suppliers to tell you what price they're going to charge one of your competitors?
>
> "A Not normally, no; that is not normal.
>
> "Q Okay. Now, there's a last paragraph there that says, 'Kendall has promised to advise me if they do in fact receive an order from VEBCO, and I will keep you informed'
>
> "THE COURT: What is wrong with that? They've been dealing with these people for 20

years, and undoubtedly have a close relationship. We're not going into all of these different things as to the quantity he buys or the other circumstances. They're entitled to this — this other company is not involved in this lawsuit.

"MR. KING: VEBCO and American Excelsior are competitors, Your Honor.

"THE COURT: That may be, but you have just now come into this, and he said for 20 years they've been dealing with this Company. We're not going to try two or three different lawsuits in here. I think it speaks for itself. I'll let that in, but we're not going to try two or three different lawsuits." [R. - 314]

And at another point involving the same exhibits [R. - 465, 466] the following:

"THE COURT: Why are we putting so much in on that? They're not part of this lawsuit. What's the significance of it?

"MR. KING: Your Honor, the significance is that everybody that VEBCO had to get supplies from, these people, American Excelsior were in contact with them.

"THE COURT: That doesn't prove anything. You'll have to get something here — don't take up our time unless you can get down to it. I don't see anything yet except we're wasting a lot of time.

"MR. DERRICK: There's no evidence that we contacted them. They contacted us.

"THE COURT: You'll have to show me something here that ties it in. This doesn't tie anything in. They notified them, and I don't see any harm in these matters here. [Tr. Vol. II - 509-10]

If the court could see no "harm in these matters," the jury would be hard pressed to believe any argument made by petitioners' counsel.

And on numerous occasions AMXCO personnel checked the Vebco premises to determine the level of their wood supply. An AMXCO witness testified such practice was not unusual. "Our competition comes around and checks our wood pile all the time." When petitioners' counsel asked him to recite specific incidences he had seen, the court stated "I think this is probably immaterial . . . I don't see any difference whether Vebco checked their wood pile or didn't check their wood pile . . . I don't see the materiality of that, seeing what other businesses are doing." The witness could think of no instances that the competition had checked the AMXCO wood supply. [R. - 333]

There are other instances relating to the court's failure to admit evidence of AMXCO's poor local management [R. - 426], the freight rate that AMXCO paid on its pad shipments [R. - 419] and the policies of AMXCO as known by the various AMXCO witnesses.

Each of these inquiries were relevant but were made to appear by the court as totally without merit even though AMXCO testimony was admitted claiming AMXCO's freight rate was lower than Vebco's, AMXCO's loss of business over the years was attributable only to the competition and it was unclear what the AMXCO pricing policies were.

Prior to trial petitioners had prepared several large exhibits to portray graphically not only the actions of AMXCO but the effects of those actions. Each time petitioner's witnesses began to testify the court interrupted and jumped from one point to another, thus creating chaos and complete confusion.

As is true with so many of the errors cited herein in respect of the court's participation, the record must be read *in toto* to grasp the full significance. A prime example, however, was the attempt to admit testimony concerning the facts summarized on Plaintiffs' Exhibit 19. [Tr. Vol. II - 137-154] This exhibit, as were several others, was prepared in accordance with the recommendation in the *Manual For Complex Litigation* that, "voluminous or complicated data of an admissible character should be presented whenever possible through written or oral summaries, tabulations, charts, graphs or extracts." Id. §2.611 at 27.

The court apparently disagreed with this principle and objective in that he stated to the jury on several occasions, and so instructed them, that "the jury understands this isn't evidence, it's merely convenience: the evidence it's taken from will have to be available." [R. - 248] [R. - 346-351] [R. - 98]

When the court took over the questioning relating to the exhibit the matter became hopelessly confused. The court finally reached the conclusion that the presentation of PX 19 was premature and other witnesses should have been called first even though the witness, Paul Britt, had made the summary on the exhibit from the books and records. The witness was passed and was recalled at a later time.

During the course of the trial several witnesses were called out of order for the convenience of the respondent when actual or potential witnesses were not going to be available at the appropriate times. One such witness was petitioners' expert, Mr. Albert R. Cox, a certified public accountant.

After the initial questioning by counsel, on its own motion the court interrupted to ask the meaning of the questioning, then minutes later the court took over the questioning altogether. [R. - 353] The court's questioning lasted for the next fifteen pages in the record. Although the court purportedly was trying to "simplify it" [R. - 354] "so the jury will know what you're doing" [R. - 355], it is clear from reading the record it was not simplified by the court's jumping from point to point and not allowing counsel to question the witness.

Initially the expert's testimony had been expected to be relatively simple and the report which was submitted to opposing counsel and filed of record was quite thorough as the court stated. [R. - 356] However, once the court began to question the witness, clarity vanished completely because there was no organiza-

tion to the presentation of the material. There is absolutely no way that the jury could have understood it. Even with the benefit of the printed word the portion of the record relating to this testimony is unclear.

Finally the court ordered that the witness read the report to the jury which had been filed and some semblance of order in the presentation was restored. However, the damage had been done.

Clearly this type of conduct by the trial court is prohibited as violating petitioners' right to trial by jury.

CONCLUSION

For the foregoing reasons the Petition for the Writ of Certiorari ought to be granted.

KENNETH L. KING
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CERTIFICATE OF SERVICE

The undersigned attorney of record for Petitioners, INTERNATIONAL AIR INDUSTRIES, INC. and VEBCO, INC., hereby certifies as follows:

(a) that I am a member of the bar of the United States Supreme Court, and that I have duly served all parties required by the Rules of said Court to be served with the foregoing Petition for Writ of Certiorari, as hereinafter shown;

(b) that the names and addresses of the attorneys of record for the adverse party are as follows:

William J. Derrick and Royal Furgeson,
P. O. Drawer 2800, El Paso, Texas 79999;
attorneys for American Excelsior Company

(c) that on this day I served three printed copies of the foregoing Petition for Writ of Certiorari on the said William J. Derrick and Royal Furgeson, attorneys for Respondent, by depositing same in the United States post office with air mail postage prepaid, properly addressed to said attorneys for Respondent at their said address.

EXECUTED this the ____ day of January, 1976.

_____

Attorney for Petitioners

APPENDIX A

INTERNATIONAL AIR INDUSTRIES, INC. and Vebco, Inc., Plaintiffs-Appellants,

v.

AMERICAN EXCELSIOR COMPANY, Defendant-Appellee.

No. 74-1953.

United States Court of Appeals, Fifth Circuit.

Aug. 18, 1975.

Kenneth L. King, El Paso, Tex., for plaintiffs-appellants.

W. Royal Furgeson, Jr., William J. Derrick, El Paso, Tex., for defendant-appellee.

Appeal from the United States District Court for the Western District of Texas.

Before TUTTLE, GODBOLD and MORGAN, Circuit Judges.

LEWIS R. MORGAN, Circuit Judge:

Appellants Vebco, Inc., and International Air In-

dustries, Inc.,[1] filed a complaint in the United States District Court for the Western District of Texas charging AMXCO, Inc.,[2] with a violation of the antitrust laws. A lengthy, complex and seemingly disorganized jury trial was held, resulting in a verdict in AMXCO's favor. Vebco appeals, alleging at least twenty substantive trial errors. We affirm the judgment below.

I.

The facts in this case are heatedly contested. Since the trial below resulted in AMXCO's favor, we consider the facts in a light most favorable to it.

Vebco, Inc., is a New Mexico corporation with its principal place of business in El Paso, Texas. It was incorporated in 1959. Vebco is primarily a distributor of heating and air conditioning equipment, although it does manufacture some products, including handmade evaporative cooler pads. It sells its pads primarily in Arizona, New Mexico, and West Texas.[3]

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1 Although Vebco and International were nominally separate business entities, they operated as one business. Because of the interrelation of the two corporations, they had only one counsel and were treated as one entity for purposes of trial. Therefore, "Vebco" will hereinafter refer to both plaintiffs, unless otherwise indicated.

2 American Excelsior Company was the named defendant in the district court, but during the course of discovery Vebco realized that AMXCO, Inc. was the corporate successor to that company. The defendant-appellant will therefore hereinafter be referred to as "AMXCO".

3 International Air Industries, Inc., was incorporated in 1969 for the purpose of manufacturing evaporative cooler pads and evaporative cooler covers for sale by Vebco. Vebco and International, although separate corporate entities, operated as one business. International ceased operations in 1972 and Vebco took over the manufacturing operation.

AMXCO, a subsidiary of Texstar Company, has its principal place of business in Arlington, Texas. It maintains a branch office in El Paso, Texas, and manufactures evaporative cooler pads which it sells throughout the southwestern and far western parts of the United States.

The source of the controversy in this case is the cooler pad, an object made of aspen wood shavings covered with crinoline cloth, used in evaporative air conditioners. Such pads have historically been made by hand, but around 1960 AMXCO achieved a breakthrough in the field and began to produce a machine-made pad. Hand- and machine-made pads are interchangeable in use, but the latter can be produced, transported, and stored more cheaply. Through its technological success and business expansion AMXCO became the world's largest producer of cooler pads.

Vebco and AMXCO have enjoyed a lengthy business relationship. The founder of Vebco, Vernon Britt, began to distribute pads for AMXCO in 1953. Until 1969, with only one short exception, the only pads Vebco distributed were manufactured by AMXCO. By selling AMXCO's pads, Vebco developed a highly successful business and gradually expanded its operations to include a complete line of heating and cooling implements.

Except for direct sales to "national accounts," AMXCO marketed all of its cooler pads through independent distributors such as Vebco. Vebco's primary customers in the El Paso-Las Cruces trade area were

discount stores. The only large discount store in the area to which Vebco did not sell cooler pads was K-mart, serviced by Passage Supply, an independent distributor for AMXCO.

Prior to 1969, AMXCO favored its El Paso distributors over its Arizona distributors in freight policy: AMXCO paid freight costs of its El Paso distributors to their customers in Arizona but did not pay the freight costs of distributors in Arizona to their customers in El Paso and Las Cruces. In order to rectify this competitive inequity, AMXCO decided to eliminate the freight pre-payment for its El Paso distributors. When AMXCO adopted a uniform freight policy: AMXCO paid freight costs of its El Paso displant for cooler pads. With the aid of three former employees of AMXCO, the owners of Vebco formed a corporation and built a plant to manufacture cooler pads by hand in 1969. Vebco then entered the market as a manufacturer and successfully competed with AMXCO. Later that same year, Southwest Industries was formed. Like AMXCO, Southwest manufactured and marketed machine-made cooler pads. There were also numerous small scale handmade pad manufacturers in the market.

When AMXCO learned that Vebco was manufacturing its own cooler pads, AMXCO terminated its distribution relationship with Vebco. Although it lost customers to Vebco in 1969, AMXCO took no action in regard to price.

In 1970, Vebco expressed considerable concern to AMXCO at the emergence of Southwest as a competitor, particularly since partners in the Vebco

manufacturing operation were officers of Southwest. Vebco even tried to induce AMXCO to purchase Vebco or its manufacturing operation. AMXCO agreed to loan the Vebco owners $20,000 to buy out the Vebco principals then involved in Southwest and to pay off Vebco's outstanding indebtedness. The negotiations to purchase Vebco never reached fruition but an agreement was reached whereby AMXCO sold specially packaged pads to Vebco which were offered for sale under Vebco's label, and Vebco sold pumps and parts to AMXCO.

Because the 1970 agreement was profitable for both parties, they agreed to continue the operation in 1971. However, prior to the 1971 selling season, relations between the two companies deteriorated, resulting in the suit before us.

In late January, 1971 Vebco dropped its price to discount houses 5% below the price currently being quoted by both AMXCO and Vebco[4] — to a 14.5% discount below list price. This price cut brought Vebco considerable business, including the very lucrative K-mart account which had previously been serviced by AMXCO's distributor, Passage Supply. The record indicates that AMXCO's distributors complained that they could not effectively compete with Vebco, because the latter manufactured its own pads for distribution.

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4 Vebco alleged at trial that it was actually meeting a price which had been quoted by either AMXCO or one of its independent distributors. However, Vebco did not attempt to verify the allegation that AMXCO was offering a lower price and there is no evidence in the record, other than Vebco's allegation, that AMXCO initiated the price cutting.

On March 1, 1971, AMXCO requested Vebco's order for three carloads of pads which Vebco had indicated it would purchase from AMXCO. When Vebco failed to verify its order, AMXCO determined that customers which had previously used AMXCO pads distributed by Vebco would now be serviced by Vebco's own pads. In effect, Vebco was going to compete against AMXCO for its customers rather than distributing its pads. AMXCO then decided to compete directly for the discount trade in the El Paso area.

Based on previous public bids by Vebco and Southwest, and on information received from customers, AMXCO determined that a 25% discount would be competitive in the market. AMXCO then contacted its old customer, K-mart, and at least one other discount house, offering the 25% discount. However, AMXCO salesmen made no sales at the 25% discount, because, unknown to them, Vebco had verified their price and had notified its customers that it, too, would give the 25% discount. Because of the lack of sales at the 25% discount, and because at least one potential customer had reported that Vebco was selling at near a 50% discount, AMXCO again lowered its price, offering a 32.5% discount. Again, Vebco verified and met this price on March 15, 1971, and AMXCO made no substantial sales.

During this intense period of competition, AMXCO delegated price-setting responsibility in the El Paso market to two of its local employees, Wendell Johnson and June Morris. Carl Gillespie, AMXCO's division manager, continued to make recommendations, and on March 16, 1971, he prepared a memorandum suggesting ways to compete with Vebco and

Southwest, which included, as one possible alternative, the option of offering prices in El Paso low enough to insure that Vebco would not profit from competitive sales. On March 17, Gillespie also wrote Morris a letter which contained the statement:

> [I]f we are committed to a program of stunting the possible growth of Vebco and keeping our foot in this quite seizeable cooler pad market, then the real question we have here is just what price do we need to determine as our lowest price level.

Vebco had a great deal of difficulty sustaining a 32.5% discount and on March 29, 1971, Vebco announced to its customers that it would return to the 25% discount. AMXCO subsequently made one sale to K-mart, its prior customer at a 39% discount. After the 1971 season, AMXCO raised its prices, offering discounts from 19 to 25% for the 1972 season.

On May 28, 1971, Vebco initiated this suit, charging AMXCO with a violation of Section 2(a) of the Clayton Act, as amended by the Robinson-Patman Act. (15 U.S.C. § 13(a)).[5] The complaint was amended on July

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5 15 U.S.C. § 13(a) provides in relevant part:

> It shall be unlawful for any person engaged in commerce, in the course of such commerce, either directly or indirectly, to discriminate in price between different purchasers of commodities of like grade and quality, where either or any of the purchases involved in such discrimination are in commerce, where such commodities are sold for use, consumption, or resale within the United States or any Territory thereof or the District of Columbia or any insular possession or other place under the jurisdiction of the United States, and where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly in any line of commerce, or to injure, destroy, or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination, or with customers of either of them . . .

28, 1972, to charge, additionally, a violation of § 2 of the Sherman Act (15 U.S.C. § 2).[6] The gravamen of the complaint is that AMXCO unlawfully discriminated in price from 1968 through 1971 and attempted to monopolize the El Paso-Las Cruces cooler pad market, as well as that of the southwestern United States, during the same period. Vebco subsequently supplemented its complaint to include the 1972 cooler pad season.

Vebco alleged damages totaling over $100,000 for the years prior to and including 1971 and $42,000 for 1972. It sought treble damages as provided under the antitrust laws, as well as an injunction against AMXCO's allegedly unlawful behavior.

The record indicates that the dollar value of Vebco's cooler pad sales has increased every year sinc 1968, with the exception of a slight decline in 1972.[7] Conversely, AMXCO's share of the national cooler pad market has declined steadily since 1969. Vebco conceded at trial that it claimed only lost profits, presumably from keen price competition, rather than lost sales for the years prior to 1971. Indeed, almost all of the allegedly illegal acts of which Vebco complains

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6 15 U.S.C. § 2 (1973) provides:
Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding fifty thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court.

7 Vebco's share of the El Paso cooler pad market also showed a steady increase from 1968 through 1971, the only years for which market figure percentages were introduced below.

occurred immediately prior to, or coincidental with, the 1971 cooler pad season. During this season, some of the firms with which Vebco previously dealt purchased pads from AMXCO. Nevertheless, Vebco's cooler pads sales, measured in dollars, and its percentage of the El Paso cooler pad market increased in 1971;[8] indeed, only Vebco's markup on pads decreased.[9]

With respect to the slight decrease in 1972 cooler pad sales, Vebco's president conceded at trial that the decline could easily have been caused by the firm's efforts to improve its manufacturing operation at the expense of its sales program. Likewise, the record reveals that 1972 was a poor season for all cooler pad manufacturers and distributors because of inclement weather.

All in all, the record before us reveals that since 1968, the cooler pad market in El Paso has been extremely competitive. The sales season for cooler pads is quite short and manufacturers must necessarily process orders early. On the other hand, the record indicates that customers intentionally quote lower prices to distributors and manufacturers than have actually been offered by a competitor in the hopes of securing a lucrative offer. Vebco, AMXCO, Southwest, and one other manufacturer continue to vigorously compete in the El Paso market.

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8 Vebco kept no separate sales figures for cooler pads prior to the initiation of this law suit. The dollar sales figures cited herein are their estimates of past sales based on a review of their invoices.

9 Vebco's markup percentage or "gross margin" (retail price minus the cost divided by the retail price) for cooler pads in the years 1968 through 1972 inclusive, was 12%, 17%, 22%, 13%, and 18% respectively.

II.

Vebco's primary argument on appeal is that the district court erred in refusing to direct a verdict in Vebco's favor on the Robinson-Patman charge.[10] The district court should grant a motion for a directed verdict only if, considering all the evidence and all reasonable inferences that can be drawn from the evidence in a light most favorable to the non-mover's case, reasonable men could not arrive at a verdict in favor of the non-mover. *Boeing v. Shipman*, 411 F.2d 365, 374 (5th Cir. 1969) (en banc). Applying this standard to the case before us, we find that the trial court was correct in refusing to direct a verdict in Vebco's favor.

Section 2(a) prohibits price discrimination between different purchasers of commodities of like grade and quality "where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly in any line of commerce or to injure,

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10 Vebco argues on appeal that while the district court erred in not directing a verdict on the Robinson-Patman claim, its disposition of the Sherman Act count was correct, for the record would not support a directed verdict as to the latter. Such an argument surprises us, for we believe that the basic substantive issues raised by the two statutes (with respect to the primary-line injury in the case of the Robinson-Patman Act) are identical. Vebco's counsel apparently feels that the conditional language of the Robinson-Patman Act ("where the effect of such discrimination *may be* substantially to lessen competition" (emphasis supplied)) implies a lesser evidentiary burden on the plaintiff than is required under the Sherman Act. Under the Robinson-Patman Act, of course, it is not necessary to show actual damage to competition, it is only necessary to show that there is a reasonable possibility that the discrimination may have that effect. *See Corn Products Refining Co. v. FTC*, 324 U.S. 726, 65 S.Ct. 961, 89 L.Ed. 1320 (1945). However, since AMXCO's activities cannot reasonably be viewed as a lessening of competition (see text accompanying notes 21-34 *infra*), then construing the "may be" language is not necessary, *see* Areeda and Turner, Predatory Practices under Section 2 of the Sherman Act, 88 Harv.L.Rev. 697, 727 (1975); *Anheuser-Busch v. FTC*, 289 F.2d 835, 843-44 (7th Cir. 1961).

destroy, or prevent competition."[11] The Act was primarily aimed at national chains that enter a locality and crush a more efficient local concern by cutting prices below cost and subsidizing local losses with excessive profits gleaned in a non-competitive area. *See* F. Rowe, Price Discrimination under the Robinson-Patman Act 123 (1962). However, Congress did not intend to abolish competition "or so radically to curtail it that a seller would have no substantial right of self-defense against a price raid by a competitor." *Standard Oil Company v. FTC*, 340 U.S. 231, 249, 71 S.Ct. 240, 249, 95 L.Ed. 239 (1951). Thus our goal in applying the Robinson-Patman Act is to maintain active competition — including price rivalry — among the members of the business community.

Encouraging competition while at the same time forbidding anti-competitive behavior calls for considerable care in this case. The facts before us reveal a large entrenched firm with a dominant market share confronted by a fledgling company attempting to enter the same market. Such a situation necessitates the greatest scrutiny on our part, for anti-competitive price cuts by the monopolist could be directed toward driving the new competitor out of the market or disciplining it in order to force it to follow the monopolist's price leadership. On the other hand, we believe that neither the Act nor any social value compels the sheltering of an individual competitor, at the

11 The Act is concerned with competitive injury to three groups: competitors of the price discriminator ("primary line"), customers of the price discriminator ("secondary line"), customers of the price discriminator's customers ("tertiary line"). Only a primary line injury is alleged in this case, and our comments and conclusions therefore pertain only to such injury.

expense of the public interest, from the competitive process. *See* F. Rowe, *supra*, at 130.

Vebco claims that AMXCO violated the Act when it sold cooler pads to El Paso customers at prices lower than it sold its pads elsewhere. A price discrimination within the meaning of the Act, of course, is merely a price difference, *FTC v. Anheuser-Busch, Inc.*, 363 U.S. 536, 549, 80 S.Ct. 1267, 4 L.Ed.2d 1385 (1960), but price discrimination is not illegal per se. Continental Baking Co. v. Old Homestead Bread Co., 476 F.2d 97, 103 (10th Cir. 1973). In order to meet the requirement of an adverse effect upon competition, Vebco claimed that there was considerable diversion of business from Vebco to AMXCO in 1971, and, additionally, that Vebco suffered a reduction in its profit margin because it had to compete with AMXCO.

It is settled law that a mere diversion of business from one competitor to another does not signify detriment to competition on the seller level.[12]

The Act is really referring to the effect upon competition and not merely upon competitors. In

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12 *Anheuser-Busch, Inc. v. FTC*, 289 F.2d 835 (7th Cir. 1961); *Minneapolis-Honeywell Regulator Co. v. FTC*, 191 F.2d 786, 790 (7th Cir. 1951). *See also*, Dixon, *Practice and Procedure Before the Federal Trade Commission*, 9 N.Y.L.F. 31, 36 (1963): "Thousands of firms go into bankruptcy every year without bringing a single tear to the eye of anyone even remotely connected with antitrust enforcement. Where a businessman perishes because of his own inefficiency, i. e., because of his inability to make as good a product, sell it at as low a price, or promote it as effectively as his competitors, his passing is noted without a tremor. Indeed, this is normally a sign that the industry in which he failed is a healthy one in which competition is vigorous enough to weed out marginal operators whose talents and resources should be employed elsewhere."

> this respect § 2(a) must be read in conformity with the public policy of preserving competition, but it is not concerned with mere shifts of business between competitors. It is concerned with substantial impairment of the vigor or health of the contest for business, regardless of which competitor wins or loses. . . . Antitrust legislation is concerned primarily with the health of the competitive process, not with the individual competitor who must sink or swim in competitive enterprise. *Anheuser-Busch, Inc. v. FTC*, 289 F.2d 835, 840 (7th Cir. [1961] 1971) (citations omitted). See *Atlas Building Products Co. v. Diamond Block & Gravel Co.*, 269 F.2d 950, 954 (10th Cir. 1959) *cert. denied*, 363 U.S. 843, [80 S.Ct. 1608, 4 L.Ed.2d 1727] (1960); F. Rowe, *supra*, at 122-23.

Mere loss of profits shows no more than that Vebco was forced to charge a competitive price because it faced competition. Similarly, the large size of the discriminator and even the fact that its sales increased during the period of discrimination would not necessarily make out a case.[13] *Anheuser-Busch, Inc. v. FTC*, 289 F.2d 835, 839, 843 (7th Cir. 1961). It is possible for damage to a single competitor to meet the statutory requirements, *see Borden Co. v. FTC*, 381 F.2d 175 (5th Cir. 1967), but a showing of more than competitive pricing and a shift of customers is necessary. Evi-

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13 We do not intimate that all of these criteria necessarily apply to the case before us. For example, the record shows that AMXCO's percentage of the market declined during the relevant period.

dence of certain types of predatory conduct, we feel, would fulfill the requirements.[14]

Coupled with its claims of lost profits and diversion of business, Vebco introduced evidence purporting to show AMXCO's "predatory intent" in order to satisfy the statutory requirements. Of the actions which Vebco alleges evinced AMXCO's predatory intent, the only one meriting extensive comment is the Gillespie memo of March 17, 1971, which Vebco claims was conclusive proof of AMXCO's predatory intent.[15]

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14 Antitrust cases and literature have indicated that the necessary primary line damage to the competition may be found in the absence of predation if certain none too clearly defined conditions result from the price discrimination. *See Continental Baking Co. v. Old Homestead Bread Co.*, 476 F.2d 97 (10th Cir. 1973); *Atlas Building Products Co. v. Diamond Block & Gravel Co.*, 269 F.2d 950 (10th Cir. 1959), *cert. denied*, 363 U.S. 843, 80 S.Ct. 1608, 4 L.Ed.2d 1727 (1960); F. Rowe, *supra* at 150-161. We find it difficult to discern the manner by which a firm's legitimately competitive behavior absent acquisition of monopoly power could cause damage to competition. However, we need not address that issue. AMXCO's share of the El Paso cooler pad market declined throughout the relevant period; the market was far more competitive after the discrimination than before it; and Vebco, Southwestern and one other manufacturer continue to exist and even grow as large competitors of AMXCO. These facts indicate that even under those cases finding a violation of the statute in the absence of predation, the requisite damage to competition is not present. *See Continental Baking Co. v. Old Homestead Bread Co.*, *supra*; *Borden Co. v. FTC*, 381 F.2d 175 (5th Cir. 1967); F. Rowe *supra* at 160-161 and cases cited therein. Consequently, Vebco necessarily rests its case upon a "predatory intent" argument.

15 Among the other actions which Vebco claims evinced AMXCO's predatory intent was AMXCO's negotiation to purchase Vebco. Even if we assumed that negotiation to purchase a less efficient competitor is in some circumstances anti-competitive, the record clearly shows that Vebco initiated the negotiations and that AMXCO refused to purchase Vebco. Vebco also contends that AMXCO's decision to discontinue supplying Vebco in 1969 was further evidence of predatory intent. However, at oral argument Vebco's counsel conceded that AMXCO had a legitimate right to terminate its relationship with Vebco because Vebco began to manufacture its own pads in 1969 and therefore operated as AMXCO's competitor.

Judicial use of the term "predatory intent" is troublesome. Several cases hold that from a finding of certain actions, the trier of fact may infer predatory intent, and from this inference the proscribed inimical effects upon competition in turn may be inferred.[16] However, application of these principles is particularly difficult, for predatory intent has never been clearly defined. Its appearance has been characterized by phrases such as "putting a crimp" into one's competitors,[17] punitively or destructively attacking other firms,[18] and acting vindictively with punitive effect.[19] But any price decrease by a legitimately competitive firm will necessarily have a non-remunerative effect upon other firms in the market, if only by decreasing their profit margins. It is therefore important to clearly indicate the types of business behavior which violate the Act.

In this appeal Vebco seeks a ruling that no reasonable man could fail to believe that AMXCO violated the statute. Vebco's allegations of predatory intent were contested at trial by AMXCO. Therefore, even under the unwieldly "double inference test," Vebco cannot prevail on appeal; the record indicates that the jury would have been justified in finding an absence of "predatory intent," or, upon finding such intent, in failing to draw the permissible inference of damage to competition.

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16 *See Utah Pie Co. v. Continental Baking Co.*, 386 U.S. 685, 696, n. 12, 87 S.Ct. 1326, 18 L.Ed.2d 406 (1967); *Continental Baking Co. v. Old Homestead Bread Co.*, 476 F.2d 97, 104 (10th Cir. 1973); *Cornwell Quality Tools Co. v. C. T. S. Co.*, 446 F.2d 825, 831 (9th Cir. 1971); *Lloyd A. Fry Roofing Co. v. FTC*, 371 F.2d 277 (7th Cir. 1966).

17 *E. B. Muller & Co. v. FTC*, 142 F.2d 511, 517 (6th Cir. 1944).

18 F. Rowe *supra* at 149.

19 *Anheuser-Busch, Inc. v. FTC*, 289 F.2d 835, 842 (7th Cir. 1961).

It is possible, of course, for a plaintiff to present evidence of predation sufficient to warrant a directed verdict, but quoting out of context segments of internal company memoranda is simply insufficient. Gillespie's memorandum reveals that AMXCO acted as any legitimately competitive and rational firm would; Gillespie considered Vebco's potential for growth and enumerated several alternatives which AMXCO officials could consider in meeting the new competitive challenge. In order to require a court to direct a verdict, Vebco must adduce evidence of what AMXCO did; at best, it showed only what AMXCO might have done. *See Anheuser-Busch, Inc. v. FTC*, 289 F.2d 835, 843 (7th Cir. 1961).

Since the allegedly harmful actions in this case involve pricing, we must examine the relationship between AMXCO's prices and costs in order to determine whether their price behavior was predatory.[20] By "predatory" we mean that AMXCO must have at least sacrificed present revenues for the purpose of driving Vebco out of the market with the hope of recouping the losses through subsequent higher prices.

When a firm sets its price equal to its average cost, its total revenues cover total costs, including normal returns on investment.[21] If a monopolist[22] is selling at

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20 We therefore do not consider other conceivably predatory behavior such as predatory investment or promotional spending.

21 *See* Areeda and Turner, *supra* note 10 at 704; P. Samuelson, Economics 447-48 (8th ed. 1970). Much of our discussion in the next few paragraphs is based upon accepted economic analysis. *See e. g.*, P. Samuelson, *supra* at 428-510.

a price at or above average cost, but could earn higher profits at a higher price, it may be attempting to deter entry into the field. Likewise a monopolist may attempt to drive out existing competition by temporarily lowering price to average cost. In either case, we believe that a price above average cost is a fairly competitive price for it is profitable to the monopolist if not to its rivals; in effect, the price excludes only less efficient firms. Areeda and Turner, *supra* note 10, at 706-707.

In the case before us, the entry of Vebco and Southwest created excess manufacturing capacity in the cooler pad market.[23] Therefore, AMXCO's marginal cost was almost certainly below it average cost.[24] In such situations we do not believe that the monopolist's pricing behavior could be deemed anti-competitive unless the monopolist set a price below its own marginal cost — since any sale at or above

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22 For the purposes of this discussion a monopolist is one who has captured a sufficiently large part of a market to be able to determine market price by varying its output. *See, e. g., Independent Iron Works, Inc. v. United States Steel Corp.*, 322 F.2d 656, 667 (9th Cir. 1963). We do not use the term to indicate that the firm is a monopolist under the language of the Sherman Act and hence violating the law by its very existence.

23 The record shows that Vebco and Southwest both built factories during the years at issue in this suit. The fact that this new production created excess capacity is also evidenced by an AMXCO memorandum which indicated that every sale Vebco made increased AMXCO's unit costs by idling some of its production facilities.

24 *Id.* at 710. If AMXCO's production facilities had been producing beyond the output at which they function most efficiently, AMXCO's marginal costs, the cost of the last unit produced, would exceed its average cost. In such a situation, a reduction of price to marginal cost would still cover all of the company's expenses (fixed as well as variable), and equally efficient competitors would make substantial profits by restricting their output to efficient levels. *See* Areeda and Turner, *supra* note 10 at 709-710.

marginal cost does not decrease short-run net returns.[25] It may be theoretically possible for a reduction of price to marginal cost by a monopolist to drive out an equally but not more efficient competitor. *Id.* at 711. However, establishing a price floor above marginal cost would permit the survival of far less efficient firms. Certainly, forcing a monopolist to charge a price higher than marginal cost could reduce industry output and waste economic resources in the short-run.[26]

It is frequently quite difficult to calculate the incremental cost of making and selling the last unit (i.e., marginal cost) from a conventional business account. *Id.* at 716. Consequently, the firm's average variable cost[27] may be effectively substituted for marginal cost in predatory pricing analysis. *Id.* at 717-18. Thus, a firm's pricing behavior can be considered anticompetitive when it sells at a price below its average variable cost.[28]

When price discrimination exists — as in the case before us — we see no reason to depart from the

25 If AMXCO set its price below average cost yet above marginal cost, it might not be profit maximizing. However, prohibiting such behavior could have undesirable effects, for it may not be possible to make a long run profit in the market and a price equal to marginal cost would be loss-minimizing.

26 There would also be insurmountable problems in the enforcement of a prohibition against marginal cost pricing. *Id.*

27 Average variable cost is the costs that vary with changes in output divided by the output.

28 It is conceivable that marginal cost would exceed average variable cost when a firm's output nears its optimum. When this is the case, using the latter as a surrogate for the former enables a firm to sell below marginal cost. However, this exception is justified because when the firm's capacity is strained, predation is especially unlikely. *See id.* at 718.

average variable cost test for predation unless it can be shown that there are significant barriers of entry into the relevant market. Thus, even if a monopolist is price discriminating, we will not infer damage to competition as a matter of law if the firm is charging a short-run, profit-maximizing price (above average variable cost) in the market in which it faces competition. And, even if its price is below this level, we will not infer damage to competition if the firm's price discrimination has beneficial effects or insignificant effects in the competitive market.[29] In short, in order to prevail as a matter of law,[30] a plaintiff must at least show that either (1) a competitor is charging a price below his average variable cost in the competitive market or (2) the competitor is charging a price below its short-run, profit-maximizing price and barriers to entry are great enough to enable the discriminator to reap the benefits of predation before new entry is possible.[31]

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29 Since AMXCO has considerable market power we need not deal with various pro-competitive justifications, such as promotional pricing, that a firm with considerably less market power might reasonably employ when charging a price below average variable cost.

30 Much of what we say here should be relevant to the requisite elements of a prima facie Robinson-Patman case. Indeed, in *Utah Pie Co. v. Continental Baking Co.*, 386 U.S. 685, 696, n. 12, 702, n. 14, 87 S.Ct. 1326, 18 L.Ed.2d 406 (1967) the Supreme Court indicated that price below "cost" is perhaps, a necessary element of a prima facie case. However, because the Court repeatedly referred to "deteriorating price structure," the opinion may hold that it is not necessary to show a price below marginal cost in order to make out a prima facie case. To the extent that the opinion stands for the latter proposition, we limit our discussion to the elements necessary to sustain a motion for directed verdict.

31 We employ the profit maximizing standard only because of our deference to a situation in which a monopolist could drive a slightly less efficient firm out of the market by charging a price above its own average cost, but then charge a very high price

it is therefore important to look to the price discriminator's costs, rather than his competitor's costs, to determine whether the price discrimination was anti-competitive. If a discriminator's price in the competitive market increases his net revenues in the short run, he will have no need to "subsidize" losses in the competitive market with the profits from his other markets.[32]

Evidence of AMXCO's costs was not cogently presented at trial, apparently because neither side considered it important. However, upon exhaustively searching the record, we find that the judge had much of the relevant data before him and we conclude from this data that the court properly denied Vebco's motion. The record indicates that AMXCO's manufacturing division charged its sales division a price for cooler pads which covered total costs, freight charges, and a "slight profit." Its sales division then resold the goods to distributors at a price based upon the distributors' bargaining power and competition in the area. For example, the manufacturing division sold AMXCO's # 1 pad in bulk to its sales division for 29 cents in 1971. The sales division then listed this pad for sale in bulk to distributors at 71 cents. AMXCO's largest discount of 39.25% (at which only one sale was

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because of the difficulty of new entry. This standard should be applied only when the barriers to entry are extremely high. The lower the barriers to entry in a market, the closer to marginal cost a monopolist would have to set its price in order for a plaintiff to prevail as a matter of law, for we see no social utility in insuring the survival of inefficient firms where a new entry is possible.

32 The absence of aid from other markets is a determinative factor in evaluating allegedly predatory conduct and, hence, in determining whether a statutory violation has occurred. *See Borden Co. v. FTC*, 381 F.2d 175, 177 (5th Cir. 1967); *Anheuser-Busch, Inc. v. FTC*, 289 F.2d 835, 842 (7th Cir. 1961).

made) produced a profit to the sales division alone of nearly 15 cents a pad. Thus, not only was the manufacturing division operating at a profit, but the sales division had a gross margin of around 33%. It would appear that AMXCO was selling its cooler pad at a price far above even its average cost.

Moreover, the record indicates that barriers to entry in the cooler pad market were virtually non-existent.[33] Neighborhood hardware store operators could — and did — purchase excelsior wood and hand make their own pads for retail sale. Indeed, the total costs of entering the market on a scale large enough to supply the entire southwestern and far western United States was less than $300,000. The condition of the market and AMXCO's financial data therefore indicate that the price rivalry in the cooler pad market could reasonably be considered pro-competitive and the judge properly denied Vebco's motion.[34]

Finally, we note that, in addition to believing the evidence rebutting Vebco's prima facie case, the jury could reasonably have found that AMXCO established one of the statute's affirmative defenses. The statute

33 We are considerably oversimplifying the barrier to entry discussion. *See* Markovits, Fixed Input (Investment) Competition and the Variability of Fixed Inputs (Investment): Their Nature, Determents, and Significance, 24 Stan. L.Rev. 507 (1972). However, all of the relevant data, including a low minimum efficient scale of operation, significant ability to attract customers of other manufacturers, availability of raw materials, etc., suggest a very low barrier entry in the cooler pad market.

34 In fact, AMXCO's sales manager testified it was never his company's policy to undercut Vebco's price "at all costs." Rather, it would appear that AMXCO was profit-maximizing throughout the entire period, for the sales manager testified that it charged the highest price it could and still make the sale. It never sold at a price at which it could not receive a reasonable profit.

provides that even where price discrimination occurs, a discriminator may not be held liable for a violation of the Act if "his lower price . . . was made in good faith to meet an equally low price of a competitor . . . ." 15 U.S.C. § 13(b) (1973). In order to avail itself of this defense, AMXCO need only have shown that its pricing system was a reasonable method of meeting Vebco's lower price. *Callaway Mills Co. v. FTC*, 362 F.2d 435, 442 (5th Cir. 1966). AMXCO need not have shown that its prices were in fact equal to those of Vebco, "but must only [have shown] facts which would lead a 'reasonable and prudent person' to believe that the granting of the lower prices would in fact meet the equally low price of a competitor."[35]

The facts of this case would enable a jury to believe that AMXCO set its price as a reasonable and prudent firm would, to meet Vebco's lower price. As the facts indicate, the cooler pad market was very competitive and buyers often misinformed a manufacturer of a competitor's price in order to induce a larger discount. When AMXCO learned that Vebco had lowered its price, it responded with a price cut which had no result. It then cut its price a second time in order to regain its lost business. Because of the uncertain and competitive nature of the market, the jury could find that AMXCO met its burden under the affirmative defense of meeting competition.

III

Vebco next argues that the lower court erroneously excluded evidence relating to AMXCO's "specific in-

35 *Id.* at 443-44. In fact, the Federal Trade Commission has held that the meeting competition defense is available to a seller which beats rather than merely meets the price of a competitor. Matter of Beatrice Foods Co., No. 8663 (F.T.C. Dec. 1, 1969).

tent" to monopolize the cooler pad market. Vebco's principal contentions focus upon the trial judge's exclusion of a series of internal AMXCO memoranda and evidence of specific prices AMXCO charged outside the El Paso area.[36]

Between September 24, 1971, and November 19, 1971, various employees and officers of AMXCO exchanged

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36 Vebco also challenges the exclusion of other evidence. For example, the court refused to admit a section of Southwest's president's deposition in which he indicated that AMXCO had previously merged with or acquired four companies. All of the alleged acquisitions occurred before 1960. Vebco admits that this testimony appears "rather innocuous" and we agree. The excluded testimony only indicates that AMXCO did not manufacture cooler pads prior to its acquisition of the other companies. Moreover, the acquisitions are of so little temporal relevance to the damage to Vebco that we believe their exclusion was proper. *See, United States v. Maryland and Virginia Milk Producers Ass'n*, 20 F.R.D. 441 (D.D.C. 1957).

The trial judge also excluded evidence of AMXCO's purchase negotiations with Southwest. Vebco claims that the evidence would have convinced the jury that AMXCO was attempting to monopolize when it later negotiated to purchase Vebco. The record reveals that AMXCO made only the most superficial inquiry into the acquisition of Southwest and, in addition, Vebco initiated its purchase negotiations with AMXCO and AMXCO refused to buy Vebco. In context, then, we do not believe that the district judge abused his discretion since the excluded evidence shows little, if anything, about AMXCO's "intent."

Vebco also takes issue with the district judge's exclusion of evidence that AMXCO penetrated the California market by selling to California manufacturers more cheaply than the manufacturers themselves could make cooler pads. We believe that this activity was socially and economically justifiable and deem it irrelevant to a showing of "intent."

Finally, Vebco claims that the trial judge abused his discretion in failing to admit a hearsay statement allegedly made by an AMXCO employee. Inasmuch as the witness through whom the statement was to be introduced could not identify the declarant, making it impossible for AMXCO to rebut the allegation, we believe the district court committed no error. Moreover, even if error was committed in the exclusion of this piece of evidence, we believe that when considered in light of the admitted evidence, that the substantial rights of Vebco were not affected and any error was therefore harmless. Fed.R.Civ.P. 61.

internal memoranda regarding a source of wood for cooler pad production. All of these memoranda were circulated subsequent to the 1971 cooler pad season and, hence, after most of the alleged injury Vebco complains of in this case. Indeed, the memoranda were written after this suit was filed. When Vebco attempted to introduce the memoranda as evidence of AMXCO's "predatory intent," the judge excluded the proffered evidence on grounds of materiality, saying:

> There was nothing in there — they said — if they don't want the wood we'll buy it. That's all right . . . it was all above board.

Vebco now contends that this exclusion, standing alone, is reversible error.

A fair reading of the memoranda supports the district judge's conclusion. The second memorandum indicates that Vebco had ordered wood from a contractor but had refused to take shipment. The memorandum queried whether AMXCO could purchase the wood in order to relieve its own shortages. However, the memorandum noted that AMXCO should proceed carefully in view of the litigation then pending and that Vebco should be given every opportunity to purchase the wood before AMXCO made an offer. The third memorandum said that Vebco had clear title to the wood and that AMXCO would be unable to purchase it, in view of the contractor's business relationship with Vebco. The memorandum did note that AMXCO should inquire the following spring as to the possibility of purchasing the contractor's entire output for use in AMXCO's Fresno operation. The

final memorandum contains the two sentences upon which Vebco bases its argument:

> With reference to the question raised in your last paragraph, I feel that it would be very much in order for you to make a trip to Luna and discuss the possibility of obtaining Reynold's total output of wood for Fresno. This would not only relieve the pressure on Englewood and Cedar City to supply wood to Fresno, but it would also deprive Vebco of their present source of wood and possibly make it rather difficult for them to continue their operation.

It would appear that the memoranda are of so little probative value that the district judge's exclusion was not an abuse of discretion. However, even assuming an error was committed, we do not believe it was of such magnitude as to require reversal. On appeal, errors during the course of a trial which do not affect the substantial rights of the parties are to be disregarded. Fed. R.Civ.P. 61; *see Connolly v. Farmer*, 484 F.2d 456 (5th Cir. 1973); *United States v. Heyward-Robinson Co.*, 430 F.2d 1077, 1083 (2nd Cir. 1970); *Bell v. Swift & Co.*, 283 F.2d 407 (5th Cir. 1960). In the context of the other evidence submitted in this lengthy and complex trial — and particularly when compared with the other admitted memoranda — the excluded memoranda would have been only a minor piece of evidence, highly unlikely to have changed the result. Therefore, any error committed in the exclusion of the memoranda was harmless. *See United States v. Heyward-Robinson Co.*, 430 F.2d 1077, 1083 (2nd Cir. 1970).

The trial judge also exlcuded evidence of the specific prices charged by AMXCO in about two dozen cities over a three-year period. At trial, AMXCO stipulated that its prices in the El Paso area were different from those charged elsewhere during the relevant period. Likewise, both Vebco's and AMXCO's witnesses repeatedly informed the jury that AMXCO's prices were higher outside the El Paso area. Nevertheless, when the trial judge excluded the exact dollar and cent figures charged elsewhere, Vebco's counsel appeared to argue that the jury simply would not believe AMXCO's prices were higher elsewhere unless it saw the exact figures, and, that Vebco's Robinson-Patman Act claim would therefore be jeopardized. Vebco now assigns the trial court's decision as error, claiming that it affected both the Robinson-Patman Act and Sherman Act claims. In essence, Vebco argues that without the exact numerical data, it was impossible to show that AMXCO was engaged in predation by supporting its price cuts in El Paso with higher prices elsewhere.

We do not agree. Vebco certainly had the right to establish price differentials between AMXCO's prices in El Paso and those elsewhere, *Cornwell Quality Tools Co. v. C. T. S. Co.*, 446 F.2d 825 (9th Cir. 1971), an opportunity of which it availed itself. But we see no merit in requiring a district court to permit the introduction of exact dollar figures, since aid from other markets, if present in this case, could be established merely by showing that a higher price was charged elsewhere. Moreover, as we have explained, a price differential alone would not show predation; unless AMXCO was selling below marginal cost, it would

have no need of aid from other markets and the dollar figures elsewhere would therefore be irrelevant.

IV.

Vebco also contends that the district court erred in its instructions to the jury, some of which "effectively increased the plaintiffs' burden of proof." In evaluating the adequacy of a charge to the jury, we consider the charge as a whole, and if the instructions taken together properly express the law applicable to the case, "there is no just ground of complaint, even though an isolated and detached clause is in itself inaccurate, ambiguous, incomplete, or otherwise subject to criticism." *Delancey v. Motichek Towing Service, Inc.*, 427 F.2d 897, 901 (5th Cir. 1970) *quoting Nolan v. Greene*, 383 F.2d 814, 816 (6th Cir. 1967).

Only two of the alleged errors in the jury charge merit extensive discussion.[37] First, Vebco assigns as

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37 In addition to the alleged errors discussed in the text, Vebco complains of other irregularities in the jury charge. Vebco claims that the trial court should have instructed the jury with respect to the purpose of the antitrust laws. We believe that the district court was correct in merely explaining the laws to the jury, since the charge apprised the jury of the meaning of the laws and fairly presented the issue to them. Vebco also claims that the district court erred by instructing the jury as to the meaning of "monopolize" and "attempt to monopolize." Since Vebco was suing AMXCO under Section 2 of the Sherman Act, which prohibits attempts to monopolize, we hardly think it error for the judge to have defined the relevant terms for the jury's benefit.

Lastly, Vebco argues that the district court erred in failing to instruct the jury on the proper consideration of the parties' stipulation. The court instructed the jury that "[s]tipulations are facts which are stipulated to and agreed to by counsel, that have been read to you and will be accepted by you as the evidence, and it is agreed to as being consi - -ed as facts by you. Of course, you determine, again, what weight should be given to it." We believe, in the context of the entire charge, that the court did not err in giving this instruction. *See Worden v. Tri-State Ins. Co.*, 347 F.2d 336, 343 (10th Cir. 1965). Moreover, the stipulation as read to the jury said, "[t]he following facts . . . are to be taken as true by the Members of the Jury."

error the trial judge's instruction that the phrase "may be substantially to lessen competition" means "a reasonable probability or possibility, not imaginary or elusive, of lessening competition must exist in order for there to be a 'substantial lessening.' " Vebco argues that the definition given requires a higher standard of proof than the proper definition which includes only the phrase "reasonable possibility" of lessening competition.

While the Supreme Court has never specifically forbidden the "probability" construction, it has employed the "reasonable possibility" language. *See FTC v. Morton Salt Co.*, 334 U.S. 37, 68 S.Ct. 822, 92 L.Ed. 1196 (1948). Since that time, a controversy has raged over the doctrinal formulation of the requisite inimical potential. In 1959 the Second Circuit opted in favor of "substantially probable," *see Standard Motor Products, Inc. v. FTC*, 265 F.2d 674, 676 (2nd Cir. 1959), *cert. denied*, 361 U.S. 826, 80 S.Ct. 73, 4 L.Ed.2d 69 (1959), but the Tenth Circuit has approved the "reasonable possibility" formulation, *see Atlas Building Products Co. v. Diamond Block & Gravel Co.*, 269 F.2d 950, 952 (10th Cir. 1959), *cert. denied*, 363 U.S. 843, 80 S.Ct. 1608, 4 L.Ed.2d 1727 (1960). Indeed, courts have frequently employed "possibility" and "probability" together as the district court did here. *See, e.g., Anheuser-Busch, Inc. v. FTC*, 289 F.2d 835, 841 (7th Cir. 1961); *Minneapolis-Honeywell Regulator Co. v. FTC*, 191 F.2d 786, 792 (7th Cir. 1951), *cert. dismissed*, 344 U.S. 206, 73 S.Ct. 245, 97 L.Ed. 245 (1952). The vacillation between the standards has even prompted one commentator to conclude that the verbal distinction between the two phrases "has become an empty quibble without operational significance." *See* F. Rowe, *supra* at 136.

We believe that any difference between the two formulations is trivial. At any rate, the use of the disjunctive by the district court ("reasonable probability or possibility") would give the plaintiff the benefit of the arguably lesser standard.

Finally, Vebco claims the district court inconsistently defined the relevant geographic market, thus materially misleading the jury. Vebco contended that the relevant market was an issue for the jury, while AMXCO claimed that the relevant market was only the El Paso area. In his charge, the district court first said that the market was a question of fact to be determined by the jury and repeatedly referred to the relevant market as the area in which the two parties competed. However, later in the charge when discussing the Sherman Act count, the court appeared to instruct the jury that the relevant market was the El Paso area as a matter of law. While such an apparent inconsistency could mislead the jury, we do not believe, under the facts of this case, that any error committed would "affect the substantial rights of the parties." Fed.R.Civ.P. 61. As we have indicated, the judge properly excluded, for various reasons, virtually all the evidence presented which dealt with AMXCO's actions outside the El Paso area. The only evidence relevant to this point which the judge admitted was the stipulation and testimony to the effect that AMXCO charged higher prices in other areas than in El Paso. In this context, then, it is difficult to ascertain any damage to Vebco caused by the charge. If Vebco could not even prove antitrust violation in the El Paso area to the satisfaction of the jury, it is highly dubious whether an allegation of monopolizing a greater area

— in the absence of evidence of actions outside of El Paso — would have improved its position. We therefore believe any error committed was harmless.

We have carefully reviewed appellant's other assignments of error and we find them meritless.

Affirmed.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
EL PASO DIVISION

INTERNATIONAL AIR INDUSTRIES, INC. and VEBCO, INC.,
Plaintiffs,

versus NO. EP-71-CA-91

AMERICAN EXCELSIOR COMPANY,
Defendant.

JUDGMENT

The above captioned action having been tried before a jury in this Court, the jury having found for the Defendant American Excelsior Company by its general verdict, and the jury having further answered all special questions propounded to it in favor of the Defendant as follows:

1. Question: Did Defendant American Excelsior Company unlawfully discriminate in price in the sale of evaporative cooler pads and therefore violate the Robinson Patman Act?

Answer: No.

2. Question: Was Plaintiff Vebco, Inc. damaged as a proximate cause of such violation, if any?

Answer: No.

3. Question: Did Defendant American Excelsior Company attempt to monopolize the evaporative cooler pad market and therefore violate the Sherman Antitrust Act?

Answer: No.

4. Question: Was Plaintiff Vebco, Inc. damaged as a proximate cause of such violation, if any?

Answer: No.

IT IS ACCORDINGLY ORDERED, ADJUDGED AND DECREED that Plaintiffs International Air Industries, Inc. and Vebco, Inc. take nothing, that the action by Plaintiffs be dismissed on the merits, and that Defendant recover of Plaintiffs its costs of action.

SIGNED AND ENTERED this 3 day of July, 1973.

/s/ ERNEST GUINN
United States District Judge

APPENDIX C

§ 13. Discrimination in price, services, or facilities — Price; selection of customers

(a) It shall be unlawful for any person engaged in commerce, in the course of such commerce, either directly or indirectly, to discriminate in price between different purchasers of commodities of like grade and quality, where either or any of the purchases involved in such discrimination are in commerce, where such commodities are sold for use, consumption, or resale within the United States or any Territory thereof or the District of Columbia or any insular possession or other place under the jurisdiction of the United States, and where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly in any line of commerce, or to injure, destroy, or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination, or with customers of either of them: *Provided*, That nothing herein contained shall prevent differentials which make only due allowance for differences in the cost of manufacture, sale, or delivery resulting from the differing methods or quantities in which such commodities are to such purchasers sold or delivered: *Provided, however*, That the Federal Trade Commission may, after due investigation and hearing to all interested parties, fix and establish quantity limits, and revise the same as it finds necessary, as to particular commodities or classes of commodities, where it finds that available purchasers in greater quantities are so few as to render differentials on account thereof unjustly discriminatory or promotive of monopoly in any line of

commerce; and the foregoing shall then not be construed to permit differentials based on differences in quantities greater than those so fixed and established: *And provided further*, That nothing herein contained shall prevent persons engaged in selling goods, wares, or merchandise in commerce from selecting their own customers in bona fide transactions and not in restraint of trade: *And provided further*, That nothing herein contained shall prevent price changes from time to time where in response to changing conditions affecting the market for or the marketability of the goods concerned, such as but not limited to actual or imminent deterioration of perishable goods, obsolescence of seasonal goods, distress sales under court process, or sales in good faith in discontinuance of business in the goods concerned.

Burden of rebutting prima-facie case of discrimination

(b) Upon proof being made, at any hearing on a complaint under this section, that there has been discrimination in price or services or facilities furnished, the burden of rebutting the prima-facie case thus made by showing justification shall be upon the person charged with a violation of this section, and unless justification shall be affirmatively shown, the Commission is authorized to issue an order terminating the discrimination: *Provided, however*, That nothing herein contained shall prevent a seller rebutting the prima-facie case thus made by showing that his lower price or the furnishing of services or facilities to any purchaser or purchasers was made in good faith to meet an equally low price of a competitor, or the services or facilities furnished by a competitor.

Payment or acceptance of commission, brokerage or other compensation

(c) It shall be unlawful for any person engaged in commerce, in the course of such commerce, to pay or grant, or to receive or accept, anything of value as a commission, brokerage, or other compensation, or any allowance or discount in lieu thereof, except for services rendered in connection with the sale or purchase of goods, wares, or merchandise, either to the other party to such transaction or to an agent, representaive, or other intermediary therein where such intermediary is acting in fact for or in behalf, or is subject to the direct or indirect control, of any party to such transaction other than the person by whom such compensation is so granted or paid.

Payment for services or facilities for processing or sale

(d) It shall be unlawful for any person engaged in commerce to pay or contract for the payment of anything of value to or for the benefit of a customer of such person in the course of such commerce as compensation or in consideration for any services or facilities furnished by or through such customer in connection with the processing, handling, sale, or offering for sale of any products or commodities manufactured, sold, or offered for sale by such person, unless such payment or consideration is available on proportionally equal terms to all other customers competing in the distribution of such products or commodities.

Furnishing services or facilities for processing, handling, etc.

(e) It shall be unlawful for any person to discriminate in favor of one purchaser against another purchaser or purchasers of a commodity bought for resale, with or without processing, by contracting to furnish or furnishing, or by contributing to the furnishing of, any services or facilities, connected with the processing, handling, sale, or offering for sale of such commodity so purchased upon terms not accorded to all purchasers on proportionally equal terms.

Knowingly inducing or receiving discriminatory price

(f) It shall be unlawful for any person, engaged in commerce, in the course of such commerce, knowingly to induce or receive a discrimination in price which is prohibited by this section.

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§ 15. Suits by Persons injured; amount of recovery

Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee.

§ 2. Monopolizing trade a misdemeanor; penalty

Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding fifty thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court.

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§ 26. Injunctive relief for private parties; exception

Any person, firm, corporation, or association shall be entitled to sue for and have injunctive relief, in any court of the United States having jurisdiction over the parties, against threatened loss or damage by a violation of the antitrust laws, including sections 13, 14, 18, and 19 of this title, when and under the same conditions and principles as injunctive relief against threatened conduct that will cause loss or damage is granted by courts of equity, under the rules governing such proceedings, and upon the execution of proper bond against damages for an injunction improvidently granted and a showing that the danger of irreparable loss or damage is immediate, a preliminary injunction may issue: *Provided,* That nothing herein contained shall be construed to entitle any person, firm, corporation, or association, except the United States, to bring suit in equity for injunctive relief against any common carrier subject to the

provisions of the Act to regulate commerce, approved February fourth, eighteen hundred and eighty-seven, in respect of any matter subject to the regulation, supervision, or other jurisdiction of the Interstate Commerce Commission.

AMENDMENT VII — CIVIL TRIALS

In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-943

INTERNATIONAL AIR INDUSTRIES, INC. and VEBCO, INC.,

Petitioners,

versus

AMERICAN EXCELSIOR COMPANY,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF FOR RESPONDENT IN OPPOSITION

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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1975

No. 75-943

INTERNATIONAL AIR INDUSTRIES, INC. and VEBCO, INC.,
Petitioners,
versus
AMERICAN EXCELSIOR COMPANY,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR RESPONDENT IN OPPOSITION

OPINIONS BELOW

The judgment of the District Court (Appendix B of Petition) is not reported. The opinion of the Court of Appeals for the Fifth Circuit (Appendix A of Petition) is reported in 517 F.2d 714 (5th Cir. 1975) and Trade Reg. Rep. ¶60,447.

JURISDICTION

The jurisdictional requisites are adequately set forth in the Petition.

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QUESTIONS PRESENTED

I. Whether controverted evidence of "predatory intent" established primary-line damage in a price discrimination claim under the Robinson-Patman Act as a matter of law where petitioners did not show that respondent's prices were below either its average variable cost or its short-run, profit maximizing price.

II. Whether a trial court's rulings on evidence and instructions to the jury deprived petitioners of a fair and impartial trial where the court's actions were within the scope of its sound discretion and did not result in a miscarriage of justice or affect the substantial rights of the parties.

III. Whether evidence that respondent acted as a reasonable and prudent person in granting lower prices to meet the low price of petitioners was sufficient to establish the statutory affirmative defense under the Robinson-Patman Act which exempts from liability price discriminators who in good faith meet competition.

STATUTES INVOLVED

The pertinent provisions of the Clayton Act, as amended by the Robinson-Patman Act, and of the Sherman Act are set forth in the Petition (Appendix C).

STATEMENT OF THE CASE

Vebco, Inc. (Vebco) and International Air Industries, Inc. (International), petitioners, sued

American Excelsior Company, now known as AMXCO, Inc. (AMXCO), respondent, requesting damages and injunctive relief for price discrimination under the Robinson-Patman Act and for attempted monopoly under the Sherman Act. AMXCO denied the charges and affirmatively pleaded all statutory defenses to the allegations of price discrimination. After a lengthy trial, a jury composed of seven men and women returned a verdict for defendant. The jury was composed of seven persons because, at the outset of the trial, an alternate juror was selected. Since he sat through the entire trial, the parties agreed that he could participate in the final deliberations.

The Fifth Circuit affirmed the jury verdict for AMXCO. In connection with petitioners' Robinson-Patman Act claim, the Court of Appeals determined that the case involved only an issue of primary line damage to competition. The facts did not raise an issue of secondary line damage. As to the claim, the Fifth Circuit held that the trial court had properly refused to direct a verdict for petitioners at the close of respondent's evidence. Since respondent had controverted all major parts of petitioners' evidence, a directed verdict was not appropriate because reasonable minds could differ about liability. Therefore, petitioners' case had not been established as a matter of law. The Fifth Circuit also overruled all other points of error listed by petitioners.

As the Fifth Circuit noted, the facts in this case were hotly contested. A comparison of the statement of facts by the Fifth Circuit and by petitioners indicates that they are still hotly contested. Petitioners do not,

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however, limit their "Statement of Facts" to a recitation of the facts; they also include opinions and arguments. For example, throughout their "Statement of Facts", petitioners complain of the trial court's evidence rulings and argue against the validity of those rulings. Utilizing this technique, petitioners devote 40 percent of their brief (21 of 52 pages) to their "Statement of Facts." The purpose of the lengthy recitation is not apparently to give a concise statement of the case as required by Rule 23(1)(e) of the Rules of the Supreme Court. Instead, the purpose seems to be to present an argument that the decisions below were simply wrong. Although the same arguments raised in the factual statement were thoroughly briefed for the Fifth Circuit, who rejected them, respondent deems it necessary to reply to them again under Rule 40(3) of the Rules of the Supreme Court to correct the inaccuracies and omissions in petitioners' "Statement of Facts." For purposes of reference, respondent will use the same subheadings used by petitioners.

I. Vebco

Vebco, Inc. is a New Mexico corporation. It is qualified to do business in the State of Texas and has its principal place of business in El Paso, Texas. (R. 132) Vernon E. Britt and his son, Paul E. Britt, are the principal shareholders of the company. Vebco is primarily a distributor of heating and air conditioning equipment although it does manufacture some products, including hand-made evaporative cooler pads. (R. 188-89) It sells its pads primarily in Arizona, New Mexico and West Texas. (R. 455)

II. International

International Air Industries, Inc. is a Texas corporation with its principal place of business in El Paso, Texas. International was incorporated in 1969 for the purpose of manufacturing evaporative cooler pads and evaporative cooler covers for sale by Vebco. The original owners of International were Vernon E. Britt, Paul E. Britt and three other former employees of AMXCO. (R. 141-206). In 1970 the Britts, through Vebco, acquired control of the company. (R. 205-206).

Vebco and International, although separate corporate entities, operated as one business. When International was in operation, all of its pads were sold by Vebco. Subsequently, Vebco took over the manufacturing operation. (R. 152-56). International ceased operations in January, 1972, but has not been dissolved.

III. AMXCO

AMXCO, Inc. is a corporation with its principal place of business in Arlington, Texas. (R. 25). It is a subsidiary of the Texstar Corporation. It maintains a branch office in El Paso, Texas. It manufactures machine-made evaporative cooler pads which it sells throughout the southwestern and far western parts of the United States.

The first evaporative cooler pads in the United States were manufactured by hand by a group of companies called Western Wood Excelsior and Western Aspen Excelsior. American Excelsior Company

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(AMXCO) did not manufacture pads until it merged with these two companies in the early 1950's. Shortly thereafter, AMXCO devised a method of manufacturing pads by machine. (R. 109-10). The innovation allowed AMXCO to realize substantial savings in time, transportation and storage because the machine-made pad could be made more efficiently than the hand-made pad. It also was not as bulky as the hand-made pad. (R. 376-77). In the late 1950's, AMXCO purchased two other companies connected with one of its former employees. (R. 110-12). AMXCO's pad manufacturing operation has not been affected by mergers or acquisitions since 1960. It has, however, participated in merger or acquisition negotiations twice since 1960.

The first set of negotiations occurred at the instigation of Vebco and International. They were concerned about competition from another machine-made pad manufacturer, Southwest Industries, Inc. (Southwest). (R. 390-91). They suggested that AMXCO acquire either both or one of their companies. (R. 392). Although the negotiations lasted for almost a year and involved several definite proposals, they did not result in an acquisition. (R. 392-417). The second set of negotiations was with Southwest. This second set was not of the "same type" as the first set. Rather, the negotiations between AMXCO and Southwest lasted less than two days. The proposals were not concrete and the meetings were nebulous. (R. 116-17).

AMXCO did not consummate either of these potential "deals" because of sound business reasons. For example, acquisition of Vebco would have created too

many conflicts with other distributors. (R. 407). The decisions were made in the face of a clear understanding that Vebco and Southwest would continue to be strong competitive forces in the manufacture of evaporative cooler pads. It was obvious, however, that AMXCO could not curtail competition in the industry by acquisition or otherwise because barriers to entry were and still are so low. For instance, the book value of International, which manufactured pads for the El Paso market beginning in 1969, was only $22,000. (R. 409). Consequently, even though AMXCO is still the world's largest producer of cooler pads, its share of various pad markets has steadily decreased. (R. 491).

Before 1969, AMXCO was competing with several small regional pad manufacturers. (R. 299). After 1969, Southwest became a major national competitor. Another major competitor is presently entering the national market, too. (Tr., Vol. II 491-92). AMXCO has always had competition; it is now more intense than it ever has been in the past.

IV. The relevant market

Evaporative cooler pads comprised the relevant product market in this case. Cooler pads are used in evaporative air conditioners or coolers. They are made of aspen wood shavings, called excelsior, which is then covered with a crinoline cloth. (R. 133-34). Although the pads manufactured by the parties in this case are interchangeable, AMXCO's production of a machine-made pad allowed it to realize substantial savings in time, transportation and storage unavailable to Vebco and International. (R. 376-78).

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The national geographic market for cooler pads is the southwestern and far western parts of the United States, where the humidity is relatively low and the temperature is warm. (R. 380). The relevant geographic market in this case was disputed. Petitioners have consistently claimed that it was the national market. They presented facts that they say substantiate their claim. Respondent continues to claim that the relevant market was a submarket encompassing the cities of El Paso and Las Cruces. The facts supported its position. The real competition between the parties took place in El Paso and Las Cruces.

Although petitioners and respondent vigorously disagreed on the dates when competition really began for purposes of this suit, petitioners urged at trial that it began for all practical purposes in 1969 when AMXCO refused to drop ship its pads for Vebco into other states and thereby forced petitioners to manufacture their own pads. It was clear from the testimony, however, that the refusal to drop ship was merely an attempt by AMXCO to treat all distributors equally. (R. 386-87). The controversy over drop shipments, in reality, was the pretext that Vebco employed to cancel outstanding orders with AMXCO and to begin manufacturing a hand made pad through the International operation. (R. 382-83).

By manufacturing a hand-made pad, petitioners in fact established the true area of their competition with AMXCO and other pad manufacturers. Robert Case, President of Southwest Industries, a third competing pad manufacturing company, explained why:

Question: How do you end up defining what might happen to be a local market?

Answer: I would define it — me personally, I would define the local market as being the area that you can service adequately and satisfactorily with the product that you're manufacturing.

Now, in the case of hand-made cooler pads, I would say that they are more apt to be confined to a local market than machine-made, because of your packaging, and the density that you can bring your pads down to.

Question: What's packaging and density have to do with it?

Answer: Well, if you get down to six pounds per cubic foot density, you get a cheaper freight rate.

The wisdom of Case's observation was soon brought home to petitioners, who in the next year arranged to purchase the majority of their evaporative cooler pads from respondent. (R. 262). Consequently, in 1970, respondent and petitioners more nearly assumed roles of manufacturer-supplier and buyer-distributor than competitors. In fact, AMXCO manufactured a specially packaged pad for petitioners. The other El Paso distributors, who considered Vebco a competitor, sold pads in a market area limited to Southern New Mexico and West Texas, an area whose trade center is El Paso and Las Cruces. (Tr., Vol. II 455).

In 1971, petitioners established beyond doubt the area of their effective competition when they chose the El Paso/Las Cruces trade area or submarket as the

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battleground for a price war with their other competitors, AMXCO and Southwest Industries. At the beginning of the year, they initiated a price cut throughout the submarket. (R. 264-66). Although they contended the price was dropped to meet competition, the competitive price was never verified. (R. 263). Not only did petitioners limit their price cut to El Paso and Las Cruces; they also limited it to the retail discount stores in the two cities. (R. 273). AMXCO followed petitioners' pattern. (R. 231-32). Consequently, as a result of their own acts, petitioners clearly illustrated that the El Paso/Las Cruces trade area was the relevant submarket in the case.

V. The interrelations of the parties and the alleged antitrust violations

For many years, Vebco was a distributor of AMXCO's cooler pads. (R. 135). By using AMXCO's pads, Vebco developed a thriving business. (R. 160). One reason that Vebco's business thrived was because AMXCO had favored Vebco in its freight policy. It paid Vebco's freight costs to customers in New Mexico and Arizona but did not pay the freight costs of distributors in New Mexico or Arizona to customers in Las Cruces or El Paso. (R. 385-87). When AMXCO adopted a uniform policy and ceased paying freight costs for all of its distributors, Vebco decided to set up its own manufacturing plant, International. (R. 190).

From the beginning, Vebco and International operated as one entity and competed with AMXCO as a manufacturer. (R. 382-83). In order to help its other El Paso distributors compete with Vebco, AMXCO

reinstated its policy of paying freight costs for those distributors to customers in New Mexico and Arizona. (Tr., Vol. III 940). AMXCO continued to sell its pads through distributors in 1969 although Vebco made a significant entrance into the market as a manufacturer and caused AMXCO to lose business. (R. 388). Later that year, Southwest entered the market.

After Southwest entered the market, Vebco contacted AMXCO about a possible acquisition. Although the negotiations regarding an acquisition fell through, the parties entered into an arrangement whereby, during 1970, AMXCO would sell a specially packaged pad to Vebco for sale under Vebco's label and Vebco would sell pumps and parts to AMXCO. (R. 400-401). At the request of Vebco's owners who held an interest in International, AMXCO loaned Vebco $20,000 to enable it to buy out the other owners of International, who were involved in Southwest, and to pay off International's outstanding indebtedness, which was owed to Southwest. (R. 397-99). The 1970 arrangement was a satisfactory one for both parties. Vebco received a better or lower price for AMXCO's pads than did any other El Paso distributor in 1970. (R. 418). In 1971, the parties decided to implement an arrangement similar to the one in 1970. (R. 417).

Implementation did not, however, occur. Instead, a price war began in El Paso and Las Cruces. It was initiated by Vebco, who in 1971 owned, controlled and operated International. Vebco cut its prices on cooler pads in El Paso and Las Cruces by five percent in January and February of 1971. (R. 263). Although Vebco said it believed that it was meeting a price in the El Paso and Las Cruces market, it did not attempt to

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verify the price. (R. 263-66; 365-66). By lowering the price, Vebco created price differences to its customers in El Paso and Las Cruces, because it did not uniformly lower the price. (R. 272). At the time Vebco made the price cut, it did not have orders on pads from K-Mart, which in the past had dealt with L. R. Paschich, a distributor for Defendant. (R. 270-71). After the cut, K-Mart gave its order to Vebco. (R. 267-69).

By taking the K-Mart business from Paschich on the basis of price, Vebco cornered the entire retail discount market in El Paso and Las Cruces. (R. 302-303). While doing so, Vebco also attempted to work a subterfuge on AMXCO, from whom it had agreed to purchase five railroad cars of pads. (R. 219). By March, 1971, Vebco had not requested delivery of the last three cars. It is now apparent that Vebco had decided to delay the order of the last three cars as long as possible so that AMXCO would believe that its pads would be sold in quantity in El Paso and Las Cruces. If Vebco could have delayed long enough, they could have cornered the discount trade in El Paso and Las Cruces without a fight and could then have cancelled the order. AMXCO would thus have been precluded from entering the market at all in 1971. AMXCO, however, finally realized this and, consequently, in March of 1971 requested that Vebco purchase the remaining three cars. Frank Turner, an employee for AMXCO, explained what happened:

> He [Britt] didn't say "yes" and didn't say "no". He just didn't give us an affirmative answer, but he didn't say "no", either. And we asked him a dozen times if he was going to place an

> order for the other three cars, and on March 1 this is virtually too late too — it's so late in the year, it's late to manufacture and produce. (R. 644).

When Turner and another of AMXCO's employees, June Morris, left Britt's office, they felt from his response that they were not going to get any further orders. (R. 328-29). They also knew that Paschich had lost the K-Mart business to Vebco and that their distributors could no longer compete with Vebco. (R. 327). Under the circumstances, AMXCO decided it had no choice but to approach the retail trade on a direct basis. (R. 329).

Since AMXCO had not sold directly to the retail discount trade in El Paso and Las Cruces, it did not know the price structure in the area. Consequently, it had difficulty setting a price low enough to meet the competition. AMXCO's first attempt did not get any business. In response to questions on cross-examination, Frank Turner, AMXCO's El Paso Manager, explained the process as follows:

> Q What did you do sir?
> A We decided we had no choice but to approach the retail trade on a direct basis.
> Q Did you do that?
> A Yes, we did.
> . . .
> Q Okay. What price did you decide you were going to sell these retail customers?
> A We decided we would offer them a discount of 25 percent.

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Q Okay. Did you have any factual information at that time which would indicate that this was the price that Vebco was selling at?

A Well, we thought we had some indicators. Number One, the Fort Bliss bid in the fall — November of the previous year for Vebco and Southwest Industries and ourselves had all bid on this thing. Southwest Industries' bid and Vebco's and ours were, I think, the Number One pad were within pennies. So this indicated that pricing could be very competitive for the coming season.

Q But you had never sold any customers in El Paso other than the Fort Bliss business for the price that you offered to Fort Bliss, had you?

A No, we hadn't.

Q Fine. All right. Were there some other indications that you had, sir?

A The indication that we had had from Mr. Paschich that he had lost the business at 15 off, and further we had information that Southwest Industries had quoted the Gibson chain at, I believe, less 15, less 10 and less 5. These indicators kind of said to us that this was about the point where —

. . .

Q Okay. Did you have any information that was about Southwest Industries which really is not involved in this lawsuit. Did you have any other information that would indicate that Vebco was selling at 25 off?

A Southwest Industries is around quoting these same people, also, as well as Vebco.

Q Yes, sir. But that's not my question.

A I see.

Q I asked you if you had any information that Vebco was selling at 25 off when you made that offer.

A Just that Vebco had indicated earlier in one of these exhibits here that they would be competitive with Southwest Industries anywhere.

Q Okay.

A So we felt this was about the figure we should go at, that this would be competitive with either one of them.

Q Okay. Now, as far as any of the other stores in El Paso, did you know that Southwest Industries had called — was making offers to these stores that you called on?

A Yes, I knew that they were making offers.

. . .

Q And you made calls on all the discount trade, is that correct?

A We did.

Q And you offered a price of 25 off?

A That's right.

Q All right sir. Did you get any business at 25 off?

A We never sold a cooler pad at 25 off.

Q Okay. Who did you personally call on to offer 25 off?

A I believe our first call, Mr. Morris and I called on Joe Walker at K-Mart.

Q Okay. Who else did you call?

A I believe we called on a Walgreen's store over there at Grant City.

Q Okay. Did you require any quantity purchase when you made these calls at 25 off?

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A No. We felt that this class of trade that you have to — should approach them pretty much the same level, because they were all competing with each other. And I can't see that you could really draw a line between two different prospective accounts.

Q When you called on them, did you ask them who was supplying them?

A No, we asked if our price was competitive.

Q And did you ask for any documentation about the price?

A It's not common, and we didn't know this then, but —

. . .

Q Fine. Okay, when you found out you were not going to get — or that you had not received any business at a discount of 25 percent off, what action did you take then, sir?

A Well, we went back at a later date and we quoted a price of 25 and 10.

Q Now, did you know that when you quoted the 25 off that Vebco had met that price?

A Nobody told us so. We asked then whether we won — if our price was competitive, and nobody — we got no response. And neither did we sell anything.

. . .

Q You didn't have any information really, factual information as to what the price was, is that correct?

A When we went back a second time?

Q Yes.

A I had had a report from our salesman, Tom Webb, who had made a call on Surplus

City on North Mesa, a man by the name of Cruz Sanchez, and his report was that Mr. Sanchez told him that he was buying cooler pads from Vebco at less 25, less 15, less 10, which all added up to about 50 percent.

Q But he also reported to you that he didn't try to get any substantiation of that, didn't he?

A I recall in his report he said that he — said to Mr. Sanchez that possibly we would meet that price, and that Mr. Sanchez just didn't react at all. (R. 329-332).

It is interesting to note that, when Sanchez testified, he admitted that he often "fished" for a price. He would tell one salesman that a prior salesman had given a lower quote when in fact the prior salesman had not. In this way, Sanchez would bait the later salesman to lower his quote below that actually given by the prior one. (Tr., Vol. II 363-64). It is also interesting to note that Sanchez and the Vebco owners were friends and that Sanchez once bought excelsior aspen rolls from AMXCO for Vebco at Vebco's request. (Tr., Vol. II 367). Finally, it is crucial to note that, during this entire period, AMXCO never lowered its prices below costs. It only reduced its prices so long as it could make a reasonable profit. (R. 339-42).

In setting prices, AMXCO also had to consider that it was supplying only one item in a product line to the discount trade. This placed AMXCO at a disadvantage. L. R. Paschich explained why:

Q Was American Excelsior competing with Vebco for the chain store business in 1971?

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A Yes.

Q Was American Excelsior primarily trying to sell pads to the chain store business?

A Yes.

Q Was Vebco selling pads and other things?

A Right.

Q Would American Excelsior be at a disadvantage in trying to sell only pads to the chain store business instead of selling pads, and pumps and floats and valves?

A I would say they would be at a disadvantage if they tried to sell only pads.

Q Why would they be at a disadvantage?

A The chain stores like to place all their business with one account. It's a very seasonable business, and it had to be handled quickly and service — lots of service, five o'clock delivery, Saturday deliveries, in order to keep up with the rush of business on — in the cooler pad business and the cooler supply business. First hot day, everybody wants their cooler started, and by golly, they need the merchandise, and this demands a lot of service. So it is to the chain store's advantage if they deal with just one man on everything they sell in that line. (Tr., Vol. II 470-71).

Consequently, while Vebco was furnishing an entire product line to the retail discount trade, AMXCO was furnishing only one item in the line, cooler pads. Since this trade "likes to do business at one stop," AMXCO was at a further disadvantage in price competition. (R. 268).

During the price war in 1971, one particular employee of AMXCO, Carl Gillespie, wrote several memoranda that contained language which petitioners believe showed obviously bad intent on the part of AMXCO. From Gillespie's own testimony, however, it is clear that his comments were always made as suggestions and did not express the company policy of AMXCO. In fact, none of his memoranda were ever written soon enough to affect company pricing changes which were in every instance made before he wrote the memoranda. (Tr., Vol. III 1043-1106).

After the price war ended in the spring of 1971, AMXCO learned of a wood supply that Vebco had contracted to buy but had apparently been unable to take. A series of interoffice memoranda were circulated about this wood supply. The memoranda show that, after AMXCO learned of the wood supply, it investigated the possibilities of buying the wood for itself but decided not to. It never purchased the wood.

One of the memoranda dated November 10, 1971, shows that an employee of AMXCO, Dale Gasch, learned that the contractor, who had cut wood for petitioners, was unable to get them to take it. (R. 468-69). The memorandum does not say that AMXCO sought out the information or initiated the contact. In fact, it did not. Gasch was interested in the wood because he needed to relieve the pressure on AMXCO's wood suppliers in Cedar City and Englewood due to a critical wood shortage. He recognized petitioners' priority rights in the wood. Consequently, before he could make a purchase arrangement with the

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supplier, he would require that the supplier contact petitioners and give them an opportunity to take the supply. He also wanted the supplier to document such action in light of the pending litigation with petitioners. Certainly, on the basis of this memorandum, no unlawful intent is expressed. The purpose for the investigation, clearly stated, was to attempt to relieve AMXCO's own supply shortages.

A second memorandum illustrates that the contact was to relieve shortages and to check for a future source of supply. (R. 470). Another employee of AMXCO observed that the supplier was satisfied with his arrangement with petitioners and that the matter should be dropped because any further attempt would be a waste of time. Although Gasch wrote one other memorandum urging that the matter be further investigated to relieve pressure on other suppliers and also to deprive Vebco of a wood source, the matter was dropped and the wood was never purchased. (R. 471; Tr., Vol. III 1111).

These facts, some of which were properly excluded, formed the basis for the jury verdict in favor of respondent AMXCO. There was substantial evidence from which a jury could conclude that AMXCO did not violate the antitrust laws.

ARGUMENT

Petitioners give three basic reasons under Rule 19(1)(b) of the Rules of the Supreme Court for granting the writ in this case: (1) the Fifth Circuit's decision conflicts with decisions by other courts of appeals; (2)

the Fifth Circuit has decided a federal question in a way in conflict with applicable decisions of the Supreme Court; and (3) the Fifth Circuit has sanctioned such a departure by the trial court from the accepted and usual course of judicial proceedings as to call for an exercise of the Supreme Court's power of supervisions. Respondent is convinced that none of these reasons applies in this case. It is also convinced that some of petitioners' arguments for granting certiorari are grounded in a misunderstanding of the clear wording and import of the Fifth Circuit's decision. A correct reading of the decision will indicate that it is not subject to question. The purpose of the argument will be first to show that the Fifth Circuit's decision is right and then to show that no valid reason exists for granting the writ in this case.

I. The decision below is clearly correct.

Petitioners' argument in the Fifth Circuit was that the trial court should have directed a verdict for them on their Robinson-Patman Act claim at the close of all the testimony. The burden on petitioners as movants in such a circumstance was heavy. The trial court could have granted their motion only if, considering all the evidence and all reasonable inferences that could be drawn from the evidence in a light most favorable to the case of the non-movant AMXCO, reasonable men could not have arrived at a verdict in favor of AMXCO. *Boeing v. Shipman*, 411 F.2d 365, 374 (5th Cir. 1969) (en banc.) Petitioners' burden therefore was to show to the trial court that they had proved every element of their Robinson-Patman Act claim as a matter of law. The Fifth Circuit correctly held that they did not meet their burden.

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The contested element of the Robinson-Patman Act claim in this case was whether petitioners had proved as a matter of law under Section 2(a) of the Act that the effect ofAMXCO's price differences "may be substantially to lessen competition or tend to create a monopoly in any line of commerce or to injure, destroy or prevent competition." The Fifth Circuit correctly determined that the contested element of the claim also involved only the primary-line competition between petitioners and respondent as cooler pad manufacturers. 517 F.2d at 720-21 n. 11 (A. 11a). There was absolutely no showing that AMXCO's actions had the requisite adverse effects on secondary-line competition or on Vebco as a distributor for AMXCO. Prior to 1971, when Vebco was a distributor for AMXCO, it admitted that it was competitive with AMXCO's other El Paso distributors. (R. 275). Prior to 1971, the other distributors were also competitive. In fact, one distributor, Robert Paschich, testified that AMXCO tried to protect it in competition with Vebco when Vebco began manufacturing pads through International. (R. 307). In the end, Paschich could not compete as a distributor with Vebco, which was a manufacturer. (R. 305). AMXCO thus had to compete directly. (R. 306-07). Consequently, the case involved only an analysis of the effects of primary-line competition in the market place.

In an attempt to meet the requirement of showing as a matter of law an adverse effect on competition, petitioners claimed that there was considerable diversion of business from Vebco to AMXCO in 1971 and that Vebco suffered a reduction in its profit margin because it had to compete with AMXCO. The Fifth Cir-

cuit held that "a showing of more than competitive pricing and a shift of customers" was necessary to meet the statutory requirements as a matter of law. 517 F.2d at 722-23 (A. 13a). Such a further showing was particularly necessary in this case. Indeed, the facts showed that there was no potential danger (1) that competition would be lessened, (2) that a monopoly would tend to be created or (3) that competition would be injured, destroyed or prevented.

As to the first proscribed effect on competition under the Robinson-Patman Act, the lessening of competition, it is clear that primary-line competition has increased. Today it is vigorous with more competitors in the market than ever before. Petitioners, for example, were merely distributors of evaporative cooler pads in 1968, the year that the First Amended Complaint alleged that antitrust violations began. (R. 19; 139). In 1969, they began to manufacture pads. (R. 141-43). There were thus two manufacturers competing in the El Paso area in that year. (R. 145). In 1970, Southwest Industries became the third pad manufacturer to compete in the El Paso area. (Tr., Vol. II 435). All three have competed in the area since. Further, after its inception, Southwest established itself as a "national" competitor in the cooler pad market in the United States which is the southwestern part of the country. (R. 299). Finally, another "national" pad manufacturer is making its weight felt and becoming a fourth competitor in an already thriving market. (Tr., Vol. II 491-92).

As to the second proscribed effect, tendency to create a monopoly, it is clear from the facts cited above that

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there is now a tendency toward proliferation in the market, not concentration or monopoly. The evaporative cooler pad market has never been more competitive. AMXCO is not monopolizing the market; it is in fact losing ground in the market. Its national sales have been declining since 1969. (R. 439-40). Petitioners and Southwest Industries have made significant inroads into AMXCO's percentage share of the El Paso/Las Cruces market. (R. 441-43, 491; Df. Ex. DO). In fact, in the year that AMXCO allegedly made a concerted effort to harm competition, 1971, the percentage share of the market for both Vebco and Southwest increased. (R. 441-43, 491; Df. Ex. DO). Finally, in the midst of this thriving competition, Vebco's total sales, gross profits and net profits on all products have increased every year since 1968. (R. 438, 490; Df. Ex. DL). This evidence consequently created at least a fact issue in regard to whether there was a tendency to create a monopoly. For example, the Fifth Circuit has held that where competing sellers experience an increase in absolute sales volume which compares favorably with the volume of an alleged price discriminator, competitive injury is unlikely. *Borden Co. v. FTC*, 381 F.2d 175, 179 (5th Cir. 1967). Under the circumstances, the proscribed effect certainly was not shown as a matter of law.

Finally, as to the third proscribed effect, injury or destruction or prevention of competition, it is also clear from the above facts that competition in the manufacture and sale of cooler pads is more intense now than ever before. The facts also illustrate that real or substantial injury has not been visited upon any of AMXCO's competitors. For example, since they began

making pads, petitioners have expanded their operation every year. They have continued to improve their process and have always been able to meet their requirements. (R. 244-47). This is not a condition in which one normally expects to see an injured or destroyed company. Further, in 1971, when AMXCO allegedly set out to destroy petitioners, the two companies evenly split the pad sales to the discount trade in the relevant market. (R. 361, 464; Pl. Ex. 19). If AMXCO had not entered the market, Vebco would thus have cornered that trade. The Fifth Circuit was certainly right, because of the facts, to require petitioners to prove much more than competitive pricing and a shift of customers to establish as a matter of law the proscribed statutory effects.

In light of the evidence in the case, the Fifth Circuit determined that the only way petitioners could prove the statutory effects as a matter of law was through evidence of certain types of predatory conduct. In fact, after comparing the authorities with the evidence in this case, the Fifth Circuit concluded that the requisite damage to competition was not present and consequently that "Vebco necessarily rests its case upon a 'predatory intent' argument." 517 F.2d at 722 n. 14 (A. 14a). Petitioners asserted to the Fifth Circuit that predatory intent was shown as a matter of law by the submission into evidence of various letters and memoranda written by AMXCO's employees. At trial, AMXCO's employees explained the import and purpose of these documents. The Fifth Circuit therefore correctly concluded that, "even under the unwieldy 'double inference test,' Vebco cannot prevail on appeal; the record indicates that the jury would have

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been justified in finding an absence of 'predatory intent,' or, upon finding such intent, in failing to draw the permissible inference of damage to competition." 517 F.2d at 723 (A. 15a). In particular, the Fifth Circuit noted that many of the alleged "predatory" memoranda contained only recommendations, not directions for action. It noted that a directed verdict could not be based on a mere showing of "what AMXCO might have done." 517 F.2d at 723 (A. 16a).

To determine what AMXCO actually did, the Fifth Circuit examined AMXCO's prices to see if they were predatory. It determined that "predatory" meant that "AMXCO must have at least sacrificed present revenues for the purpose of driving Vebco out of the market with the hope of recouping the losses through subsequent higher prices." 517 F.2d at 723 (A. 16a). The Fifth Circuit then proceeded to analyze prices and costs based upon suggestions propounded in Areeda and Turner, *Predatory Pricing and Related Practices under Section 2 of the Sherman Act*, 88 Harv. L. Rev. 697 (1975). In the article, Professors Areeda and Turner forcefully argue that the "basic substantive issues raised by the Robinson-Patman Act's concern with primary-line injury to competition and by the Sherman Act's concern with predatory pricing are identical." *Id.* at 727. They explain that if "the Sherman Act is properly interpreted to permit a monopolist to discriminate in price so long as his lower price equals or exceeds marginal costs, such discrimination is a fortiori permissible for firms with lesser degrees of market power, and the Robinson-Patman Act should be interpreted no differently in primary-line cases . . ." *Id.* at 727. In the next paragraph of their article

they note that the statutory language and compelling legislative history of the Act do not dictate otherwise. *Id.* at 727. Their final conclusion at page 728 provides wisdom directly applicable to this case:

> But even though determinations of cost may remain a substantial problem, it seems clear to us that in this instance it is unavoidable. In the vast majority of situations, discriminatory price-cutting — insofar as primary-line competition is concerned — will be profitable to the firm concerned and procompetitive. Thus any such simple test as "diversion" or "deteriorating price structure" would be wrong most of the time. We should not pay that price for administrative simplicity.

The economic analysis of these two noted authorities in the field of antitrust law is unquestionably sound. By defining and determining the various "costs" a firm has, they correctly suggest that it can then be determined if the firm "is seeking to maximize profits or minimize losses, since a firm which seeks to do so is normally responding to acceptable economic incentives and is thus not engaging in predatory behavior." *Id.* at 701. A firm maximizes profits or minimizes losses by regulating its output. It determines if its output is a profit-maximizing one by noting if any increase in output would add more to costs than to revenues. It determines if its output is a loss-minimizing one by noting if any decrease in output would reduce revenues more than costs. *Id.* at 701. It then follows that a firm can determine whether to

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decrease or increase output by looking to the incremental cost of making and selling the last unit, which is its marginal cost. It further follows that, if a firm sets its output at a level where marginal cost exceeds price, part or all of the output is sold at an out-of-pocket loss. *Id.* at 712. It finally follows that, if a firm produces at such an out-of-pocket loss, its motives go beyond profit maximization or loss minimization. As a result of this analysis, Professors Areeda and Turner observe at page 712 that

> marginal-cost pricing by a monopolist should be tolerated even though losses could be minimized or profits increased at a lower output and higher price, for the reasons, among others, that marginal-cost pricing leads to a proper resource allocation and is consistent with competition on the merits. Neither reason obtains when the monopolist prices below marginal cost. The monopolist is not only incurring private losses but wasting social resources when marginal costs exceed the value of what is produced. And pricing below marginal cost greatly increases the possibility that rivalry will be extinguished or prevented for reasons unrelated to the efficiency of the monopolist. Accordingly, a monopolist pricing below marginal cost should be presumed to have engaged in a predatory or exclusionary practice.

Professors Areeda and Turner give an exhaustive treatment of the concept of predatory pricing in their article. The above overview is only an explanation of

the part of the article most pertinent to this case in order to delineate the primary justifications for requiring below-cost pricing before predatory conduct is found. If such a requirement is not mandated, then pricing behavior that leads to a proper resource allocation and is consistent with competition on the merits might be thwarted in the courtroom. As a result, the mere threat of litigation could then "materially deter legitimate, competitive pricing." *Id.* at 699. The very purpose of the antitrust laws would consequently be negated. In this case, the Fifth Circuit understood this very problem and stated that "our goal in applying the Robinson-Patman Act is to maintain active competition — including price rivalry — among members of the business community." 517 F.2d at 721 (A. 11a). In accordance with a suggestion in the article, the Fifth Circuit determined that, in a predatory pricing analysis, a firm's average variable cost would be effectively substituted for marginal cost. "Thus, a firm's pricing behavior can be considered anti-competitive [as a matter of law] when it sells at a price below its average variable costs." 517 F.2d at 724 (A. 18a). The Fifth Circuit stated one exception to the rule which again is consistent with the analysis of Professors Areeda and Turner. If there are significant barriers to entry into the relevant market, damage to competition will be inferred as a matter of law when a firm is charging below a short-run, profit-maximizing price in the market. Such a price is above average variable price. *Id.* at 705. Even if a firm's price is below the short-run profit-maximizing level, the Fifth Circuit concluded that it would "not infer damage to competition if the firm's price discrimination has beneficial effects or insignificant effects in the competitive market." 517 F.2d at 724 (A. 19a).

Using these analytical standards, the Fifth Circuit examined the cost and pricing structure in the market in this case. At the outset, it should be noted that petitioners did not challenge in their Petition the accuracy of the examination, which illustrated that AMXCO, at its lowest market price, was selling its cooler pads at a level far "above even its average cost." 517 F.2d at 725 (A. 21a). As Professors Areeda and Turner correctly observe, average cost is always higher than average variable cost. *Id.* at 700-701. Consequently, AMXCO's prices were clearly above average variable cost. The second step of the analysis then required the Fifth Circuit to examine barriers to entry into the market. It found that they were "virtually non-existent." 517 F.2d at 725 (A. 21a). It concluded that the "condition of the market and AMXCO's financial data therefore indicate that the price rivalry in the cooler pad market could reasonably be considered pro-competitive and the judge properly denied Vebco's motion." 517 F.2d at 725 (A. 21a).

The Fifth Circuit also decided that the jury could reasonably have found that AMXCO established the statutory defense of discriminating in price to meet competition in good faith. The facts certainly support this conclusion because of the highly competitive market and the propensity of buyers to "fish" for better discounts. The Fifth Circuit found that the evidence would support a conclusion that AMXCO knew facts which would lead a reasonable and prudent person "to believe that the granting of the lower prices would in fact meet the equally low price of a competitor." *Callaway Mills Co. v. FTC*, 362 F.2d 435, 443-44 (5th Cir. 1966). Under the circumstances, if AMXCO

happened to beat not meet the lower price, it still would be entitled to the defense. Professors Areeda and Turner agree and write at pages 725 and 726 of their article the following:

> If, as we have contended, a monopolist should be permitted to make a general price reduction so long as his price equals or exceeds marginal cost, we are unable to see a persuasive case for prohibiting selective price-cutting to retain or obtain particular customers. Selective price-cutting cannot possibly be more harmful to small competitors than a general price reduction to the same level. And since any additional sale at a price at or above marginal cost does not decrease shortun net returns, the necessary element of predation is missing.

The remainder of petitioners' arguments to the Fifth Circuit involved the evidence rulings and legal instructions of the trial court. As to the evidence rulings, the Fifth Circuit correctly determined that they did not constitute an abuse of the court's discretion and, at any rate, did not affect the substantial rights of the parties. For example, although petitioners protested the exclusion of the wood supply memoranda, the Court of Appeals found that they would have been only a "minor piece of evidence, unlikely to have changed the result." 517 F.2d at 727 (A. 25a). It also correctly found that the omission from the evidence of the exact amount of AMXCO's prices outside El Paso and Las Cruces was proper, especially when AMXCO's price levels were substantially above marginal cost and it

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obviously did not need to support the El Paso and Las Cruces submarket with aid from other markets. 517 F.2d at 728 (A. 26a-27a). Finally, the Fifth Circuit concluded that the instructions to the jury were, at most, harmless error.

This description of the opinion below has been lengthy. Length was necessary, however, to emphasize the merit and sound analysis of the Fifth Circuit. The opinion is well-reasoned and grounded in well-accepted economic principles. It furthers the goals and objectives of the antitrust laws, which are premised on the assumption that the "unrestrained interaction of competitive forces will yield the best allocation of our economic resources, the lowest prices, the highest quality and the greatest material progress, while at the same time providing an environment conducive to the preservation of our democratic political and social institutions." *Northern Pacific Railway v. United States*, 356 U.S. 1, 4-5 (1958). As its main achievement, the opinion recognizes that price discrimination is "a neutral phenomenon in economics, and 'may be evidence of either effectively monopolistic or effectively competitive forces, depending on its setting.' " Rowe, *Price Discrimination under the Robinson-Patman Act* 25 (1962). Its analysis allows future courts to determine more reasonably, by isolating the cost issue, which forces are at work in the market place. Monopolistic forces can consequently be checked while competitive ones remain unfettered. The Fifth Circuit performed its task admirably in this case; its opinion should not be disturbed.

II. The decision below does not conflict with applicable decisions of the Supreme Court or other Courts of Appeal.

Of the seven "conflict" reasons that petitioners give for granting the writ, four involve alleged conflicts between the decision below and decisions by the Supreme Court. Three involve alleged conflicts between the decision below and decisions of other Courts of Appeal. Petitioners' reasons will be discussed in the order used in the Petition.

A. *The Fifth Circuit correctly held that pricing below certain well-defined costs must be proved before the requisite likelihood of harm to competition can be established as a matter of law in a Robinson-Patman Act case.*

Petitioners' first reason for granting the writ is an argument that the Fifth Circuit enunciated a predatory pricing standard that conflicts with the Supreme Court's rulings in *Utah Pie Company v. Continental Baking Company*, 386 U.S. 685 (1967); *FTC v. Anheuser-Busch, Inc.*, 363 U.S. 536 (1960); and *Moore v. Mead's Fine Bread Company*, 348 U.S. 115 (1954). In support of their argument, petitioners write at page 30 of their Petition the following:

> Based upon the Court of Appeals same reasoning vis-a-vis below cost sales, the court held it was unnecessary to construe the "may be" language of the Robinson-Patman Act and cited Areeda and Turner, *Predatory Practices under Section 2 of the Sherman Act*, 88 Harv. L.

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> Rev. 697, 727 (1975). In other words the Court of Appeals has ruled that unless there is below cost selling the "incipiency" sections can have no force or effect.

This summary of the case holding is wrong, but the argument does not fail for that reason alone. It also fails because a correct interpretation of the case will reveal that it is not in conflict with any of the decisions listed above.

When the Fifth Circuit decided that it was not necessary to construe the "may be" language of the Act in this case, it did so simply because it determined that AMXCO's activities could not "reasonably be viewed as a lessening of competition." 517 F.2d at 720 n. 10 (A. 10a). It was not holding that the "incipiency" sections of the Act can have no force or effect unless there is below cost selling. Indeed, under no conceivable interpretation can the Fifth Circuit's opinion be construed to so hold. Rather, the Court of Appeals held that the "incipiency" sections of the Act are not proved as a *matter of law* unless

> either (1) a competitor is charging a price below his average variable cost in the competitive market or (2) the competitor is charging a price below its short-run, profit-maximizing price and barriers to entry are great enough to enable the discriminator to reap the benefits of predation before new entry is possible.

517 F.2d at 724 (A. 19a). The decision is unquestionably clear in this regard.

An understanding of this holding also provides the distinction between this case and *Utah Pie*. In fact, in a footnote the Fifth Circuit purposefully distinguished the two cases:

> Much of what we say here should be relevant to the requisite elements of a prima facie Robinson-Patman case. Indeed, in *Utah Pie Co. v. Continental Baking Co.*, 386 U.S. 685, 696, n. 12, 702, n. 14, 87 S.Ct. 1326, 18 L.Ed.2d 406 (1967) the Supreme Court indicated that price below "cost" is perhaps, a necessary element of a prima facie case. However, because the Court repeatedly referred to "deteriorating price structure," the opinion may hold that it is not necessary to show a price below marginal cost in order to make out a prima facie case. *To the extent that the opinion stands for the latter proposition, we limit our discussion to the elements necessary to sustain a motion for directed verdict.* (Emphasis added.)

517 F.2d at 724 n. 30 (A. 19a). The distinction is thus between the proof requirements of establishing a factual basis for a claim and establishing a claim as a matter of law. The Fifth Circuit does not say that petitioners failed to establish a factual basis for their claim or, in other words, that they failed to establish a prima facie case. If they did, however, then the case was properly given to the jury in light of the facts already discussed. There were conflicting inferences arising from the facts. Merely because one set of facts are labeled prima facie proof does not mean that that

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set should "be treated as conclusive on the fact finder so as to deprive him of his responsibility to choose among disputed inferences." *Wright v. Rockefeller*, 376 U.S. 52, 57 (1964). This is true "whether the conflicting inferences are drawn from evidence offered by the plaintiff or by the defendant or both." 376 U.S. at 57.

The holding in *Utah Pie* is completely consistent with this view. The plaintiff received a jury verdict. The Tenth Circuit reversed on the ground that the requisite harm to competition had not been proved. The Supreme Court reversed the Tenth Circuit on the ground that, from the evidence, the "jury was entitled to conclude" that the requisite harm had been proved. 386 U.S. at 703. The plaintiff had thus made out a prima facie case and was entitled to go to the jury. A reading of the facts in the case illustrates that *Utah Pie* stands for, if anything, a predisposition by the Supreme Court to allow jury consideration of close or questionable cases. That very thing was done in this case and petitioners lost. *Utah Pie* therefore gives them no comfort.

Besides *Utah Pie*, petitioners assert that the Fifth Circuit's opinion conflicts with *FTC v. Anheuser-Busch, Inc.*, *supra*, and *Moore v. Mead's Fine Bread Company*, *supra*. Since both the cases involve price discrimination in various submarkets, petitioners apparently cite them in support of their argument that they should have been allowed to show AMXCO's exact prices outside of El Paso and Las Cruces. Petitioners' argument, however, is not valid and the trial court correctly excluded the prices. Before respondent discusses the two cases cited above, it will

give the reasons justifying the trial court's exclusion of the evidence.

In the first place, evidence was admitted that AMXCO charged prices in El Paso and Las Cruces that were different than those charged in other areas. Portions of a stipulation were admitted, for example, which informed the jury the following:

> Defendant AMXCO has charged its customers in the El Paso-Las Cruces trade area different prices, contemporaneously in time, for the same grade and quality of evaporative cooler pad.
>
> Defendant AMXCO has charged its customers in the El Paso-Las Cruces trade area and its customers in other Southwestern states different prices, contemporaneously in time, for the same grade and quality of evaporative cooler pad. (R. 68).

Further, testimony was admitted which informed the jury that AMXCO was charging lower prices for its pads in El Paso and Las Cruces than it was in other areas. Paul Britt, one of petitioners' officers, testified, for example, that he learned AMXCO's prices in El Paso and Las Cruces were lower than its prices in other markets. (R. 231-32). June Morris, one of AMXCO's employees, testified that AMXCO's prices were lower in El Paso and Las Cruces than in other areas. (R. 337-38). Another one of AMXCO's officers, Carl Gillespie, also testified that the price competition between the parties was localized in El Paso and Las

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Cruces. (R. 430). Since evidence establishing the geographic price differences was already before the jury, the further offer of proof was merely cumulative in nature. "A trial court has wide discretion in a situation of that kind." *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 230 (1940). This is especially true in a complex case of long duration like the present one. Moreover, some restraint on the introduction of evidence must be imposed to insure that the jury is not unnecessarily confused. *Id.* at 230-31. See also Fed. R. Civ. P. 61; 11 Wright and Miller, *Federal Practice and Procedure*, §2885 (1973). In effect, it is clear that, from the evidence in the record, the jury was fully informed of AMXCO's geographic price differences and did not need information of specific prices in other markets to evaluate adequately the charges of petitioners.

In the second place, failure to admit the evidence on prices was not, by itself, reversible error. The mere fact that a competitor may set prices in one competitive market lower than its prices in other markets is not alone evidence of predatory misconduct which may have adverse effects on competition. In *Anheuser-Busch, Inc. v. FTC*, 289 F.2d 835 (7th Cir. 1961), on remand from the Supreme Court's decision in *FTC v. Anheuser-Busch, Inc.*, *supra*, the Seventh Circuit observed that, absent a showing that a competitor has aid from its other markets when lowering its price in one, the competitor is not necessarily violating the Robinson-Patman Act by the reduction in price. In that case, Anheuser-Busch was the predominant beer manufacturer in the United States. In response to competition in St. Louis, it lowered its prices in that market while maintaining them at higher levels in

other markets. The Court found that Anheuser-Busch had not violated the law and observed:

> Turning now to the situation at bar, we find that, there being no showing that AB had aid from its other markets and despite a decrease in its national sales, AB forthrightly met its robust competition in the St. Louis market by a multiple-pronged program, which included but was not limited to a two-step reduction in its price to exactly meet that of its competitors. The record affirmatively shows that AB used restraint in its competition efforts. Its conduct was in conformity with the principal that competition is the decisive force in the market place.

289 F.2d at 842. In light of *Anheuser-Busch*, since no evidence was introduced in the present case which even implied that respondent had aid from its other markets when it lowered its prices in El Paso and Las Cruces, the trial court certainly did not commit reversible error by excluding some evidence of specific prices outside El Paso and Las Cruces.

From this discussion, it is clear that the exclusion of the prices in other markets was justified. Further, the Fifth Circuit's holding that the exclusion was justified does not conflict with the Supreme Court's decisions in *Anheuser-Busch* or *Mead's Fine Bread*. In fact, the decision below does not conflict in any way with the two cases. *Anheuser-Busch*, for example, dealt solely with whether there had been a price discrimination. 363 U.S. at 549. The Supreme Court specifically limited

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its holding to that one question and refused to discuss facts relevant to other matters which might be put in issue in a Robinson-Patman Act proceeding, such as the likelihood of injury to competition. 363 U.S. at 552. Under the circumstances, a conflict between the decision below and *Anheuser-Busch* is impossible to find.

Neither does the decision below conflict with the Supreme Court's ruling in *Mead's Fine Bread.* It involved a question of whether discriminatory prices in a local, intrastate market underwritten by higher prices in interstate markets violated the jurisdictional provisions of the Robinson-Patman and Clayton Acts relating to interstate commerce. The Supreme Court answered affirmatively and noted that "the treasury used to finance" the local warfare was drawn from interstate as well as local sources. The "profits made in interstate activities would underwrite the losses of local price-cutting campaigns." 348 U.S. at 119. Since the decision below did not involve a jurisdictional question relating to commerce and since there was no evidence of any kind admitted or offered for admission in the trial court indicating that AMXCO underwrote losses in El Paso and Las Cruces by profits made elsewhere, no conceivable conflict exists between the decision below and *Mead's Fine Bread.*

Before leaving the discussion under this heading, respondent must also speak to petitioners' fifth reason for granting the writ, which is so related to the first reason as to require a combined response. Basically, petitioners argue that, by showing injury to themselves as a single competitor, they sufficiently

proved a substantial adverse effect upon competition. Although this seems to be another argument directed to the Robinson-Patman Act issue because the Fifth Circuit specifically examined the question of injury to competition as distinguished from injury to a competitor when discussing that issue, petitioners cite a conflict with the Supreme Court opinion in *Klor's, Inc. v. Broadway Hale Stores, Inc.*, 359 U.S. 207 (1959), which was a Sherman Act case. Respondent therefore is uncertain of the thrust of the argument. It could go to issues involving either of the two antitrust acts.

If the argument is directed to the Sherman Act issue, it has no merit. *Klor's* involved a summary disposition of a complaint before trial. The Supreme Court held that the allegations stated a cause of action and reversed for a trial. In this case, a trial was held. Evidence was admitted as to petitioners' alleged injury. All possible instructions requested in regard to and applicable to this particular issue under the Sherman Act were given. Petitioners do not even complain of the trial court's failure to direct a verdict for them as to the Sherman Act claim. 517 F.2d at 720 n. 10 (A. 10a). No conflict is apparent. One cannot even be imagined.

If the argument is directed to the Robinson-Patman Act issue, it also has no merit. In the first place, petitioners had to establish more than some injury to themselves to prove as a matter of law that respondent's acts had a substantial adverse effect upon competition. They did not. The *Klor's* decision certainly cannot be stretched, under such circumstances, far enough to give any relief. In the second place, petitioners claim that this rule must apply

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because there was proof that no other competitor could have filled the competitive void created by their destruction. Petitioners, however, were not destroyed. There was no evidence of a competitive void. Consequently, even if petitioners are attempting to use the *Klor's* decision to draw some analogy to the facts at hand, there is nothing upon which to analogize. The argument simply fails. Therefore, no further attention will be given to petitioners' fifth reason for granting the writ.

B. The Fifth Circuit correctly held that the inferences of predatory conduct in this case, if any, were controverted by respondent so that the requisite likelihood of harm to competition was not shown as a matter of law.

Petitioners again reiterate the "examples" of predatory conduct which they believe required the trial court to hold as a matter of law that the requisite likelihood of harm to competition was proved. The failure of the Fifth Circuit to reverse on this point creates a conflict, they argue, between the decision below and the Fourth Circuit decision in *Maryland Baking Company v. FTC*, 243 F.2d 716 (4th Cir. 1957), and the Sixth Circuit decision in *E. B. Muller & Co. v. FTC*, 142 F.2d 511 (6th Cir. 1944). This contention has no merit. In both *Maryland Baking* and *Muller* the Courts of Appeal were reviewing decisions by the Federal Trade Commission where the commission as fact finder had determined that the Robinson-Patman Act was violated. The Courts of Appeal agreed that the evidence supported the fact-finding decisions of the Commission.

In this case, the fact-finders were also given an opportunity to decide if the Robinson-Patman Act was violated. They simply reached a different conclusion than the Commission did in *Maryland Baking* and *Muller*. Any number of factual differences in the cases can explain the different results. For example, in *Muller*, both defendants sold their products below cost. 142 F.2d at 516. In this case, AMXCO did not. In effect, the distinction between a prima facie case and a case as a matter of law is again applicable to petitioners' argument. There are no conflicts and there is thus no reason to grant the writ.

C. *The Fifth Circuit correctly held that the trial court's instructions and evidence rulings as to relevant geographic market did not affect the substantial rights of the parties.*

The questions petitioners raise in regard to the relevant geographic market do not, as they contend, present a conflict with either the Supreme Court's decision in *United States v. Grinnell Corp.*, 384 U.S. 563 (1966), or the Ninth Circuit's decision in *Case-Swayne Company v. Sunkist Growers, Inc.*, 369 F.2d 449 (9th Cir. 1966), *rev'd on other grounds*, 389 U.S. 384 (1968). In neither *Grinnell* nor *Case-Swayne* were there allegedly inconsistent jury instructions about relevant market or exclusions of evidence in regard to part of the alleged relevant market. The argument here then is simply that the trial court committed errors in its instructions and evidence rulings regarding the relevant market and that the Fifth Circuit incorrectly failed to reverse the trial court on that basis.

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In discussing petitioners' first reason for granting the writ, respondent devoted considerable attention to the evidence rulings regarding matters outside El Paso and Las Cruces. That discussion will not be duplicated. It is merely sufficient to say that the trial court had ample justification for excluding the evidence and that the exclusions did not amount to an abuse of discretion or affect the substantial rights of the parties. Therefore, the remainder of this discussion will relate to the jury instructions.

Petitioners argued to the trial court in this case that the determination of the relevant geographic market was a fact question for the jury. Generally, the question of whether a particular geographic location is the relevant market or the area of effective competition in a case under the Sherman Act is a matter of fact. *Case-Swayne Company v. Sunkist Growers, Inc.*, 369 F.2d 449 (9th Cir. 1966), *rev'd on other grounds*, 389 U.S. 384 (1968). As in other kinds of cases, however, if no fact issue is presented, the question is a matter of law. *Thomsen v. Cayser*, 243 U.S. 66 (1916). Respondent argued that no fact issue was presented. It asserted that El Paso and Las Cruces formed the relevant geographic submarket in the case as a matter of law. When the facts are compared with the relevant authorities, the merit of respondent's argument is apparent. It is clear, for example, that a submarket can often be the relevant market for a particular case. As the Ninth Circuit observed in *Case-Swayne Co. v. Sunkist Growers, Inc., supra* at 456, "there may be a well-defined submarket which constitutes the relevant market for antitrust purposes, which . . . must correspond to the commercial realities of the industry

and is affected by price disadvantages due to transportation costs. . ." Such was the case in this instance.

The facts supporting this authority have already been set out in the "Statement of the Case" under the heading dealing with relevant market. They are that petitioners produced a hand-made pad that could not be transported or stored as efficiently or cheaply as the machine-made pad produced by respondent. Petitioners initiated the price war in this case in 1971 by dropping their prices only in El Paso and Las Cruces. Their losses, if any, were attributable to the war between them and respondent as pad manufacturers. Their losses could not, for example, be attributed to their sales before 1971 on pads manufactured by respondent since it always sold its pads to petitioners at prices equal to or lower than the prices charged to other distributors in El Paso. These and other facts outlined earlier illustrate that the area of competition between the parties was El Paso and Las Cruces. Respondent answered the price cuts in those two cities only. Its actions in response to the cuts would be the best evidence of an attempt to monopolize. Respondent therefore argued that the two cities were the relevant geographic market.

The trial court gave several instructions on the issue. In the earlier part of its charge, it told the jury that "you must determine the relevant geographic market area . . ." (R. 85). Later, it said that you "are instructed that the relevant market in this case is the so called El Paso-Las Cruces market for evaporative pads." (R. 97). Petitioners assert that the latter instruction was wrong and that the two instructions confused

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the jury. From the above analysis, however, respondent asserts that an instruction as a matter of law, if that occurred, would not have been wrong. Moreover, the Fifth Circuit addressed the question of the jury confusion directly and noted:

> While such an apparent inconsistency could mislead the jury, we do not believe, under the facts of this case, that any error committed would "affect the substantial rights of the parties." Fed. R. Civ. P. 61. As we have indicated, the judge properly excluded, for various reasons, virtually all the evidence presented which dealt with AMXCO's actions outside the El Paso area. The only evidence relevant to this point which the judge admitted was the stipulation and testimony to the effect that AMXCO charged higher prices in other areas than in El Paso. In this context, then, it is difficult to ascertain any damage to Vebco caused by the charge. If Vebco could not even prove antitrust violation in the El Paso area to the satisfaction of the jury, it is highly dubious whether an allegation of monopolizing a greater area — in the absence of evidence of actions outside of El Paso — would have improved its position. We therefore believe any error committed was harmless.

517 F.2d at 729 (R. 29a-30a). Under the circumstances, the decision below is neither incorrect or in conflict with *Grinnell* or *Case-Swayne*.

D. *The Fifth Circuit correctly held that the trial court's rulings as to evidence allegedly relevant to specific intent did not affect the substantial rights of the parties.*

Again, in petitioners' arguments relating to intent, the contention actually is not that there is any conflict but that the decision below is wrong. A quick examination of the Supreme Court decisions cited by petitioners will clearly illustrate that the decision below is not in conflict with them. The decision in *United States v. Pullman Co.*, 330 U.S. 806 (1947), will be examined first to emphasize exactly how meritless petitioners' argument is. The entire opinion can be cited because it is only two sentences:

> Per Curiam: The judgment is affirmed by an equally divided court. Mr. Justice Jackson took no part in the consideration or decision of these cases.

330 U.S. at 807. It would take more than a magician to divine a conflict in the decision below and *Pullman*. Not possessing any extraordinary powers of insight, respondent simply cannot do so.

In all but one of the other cases cited by petitioner, the issues were tried before a judge, not a jury. In such situations, evidence is rarely excluded for any reason. It is presumed that the trial court can sift through the facts and base his decision only on those that are relevant. For example, the *Standard Oil Co. of New Jersey v. United States*, 221 U.S. 1 (1911), the Supreme Court observed:

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> The overruling of the exceptions taken to so much of the bill as counted upon facts occurring prior to the passage of the antitrust act, — whatever may be the view as an original question of the duty to restrict the controversy to a much narrower area than that propounded by the bill, — we think by no possibility, in the present stage of the case, can the action of the court be treated as prejudicial error justifying reversal. We say this because the court, as we shall do, *gave no weight to the testimony adduced under the averments complained of except in so far as it tended to throw light upon the acts done after the passage of the antitrust act* and the results of which it was charged were being participated in and enjoyed by the alleged combination at the time of the filing of the bill.(Emphasis added.)

221 U.S. 46-47. By elimination, only one decision is left, *Continental Ore Co. v. Union Carbide and Carbon Corp.*, 370 U.S. 690 (1962).

In *Continental Ore*, the Supreme Court did find that the trial court committed error in its "persistent exclusion" of evidence relating to time periods earlier than the one involved in the immediate controversy. 370 U.S. at 709. The Court, however, further observed that it did not mean that a trial court might not "place reasonable limits upon such evidence or set a reasonable cut-off date, evidence before which point is to be considered too remote to have sufficient probative value to justify burdening the record with it." 370 U.S. at 710. The decision below can consequently be distinguished from *Continental Ore* in two ways.

First, there was not a persistent exclusion of evidence in this case. At most, petitioners complain of the exclusion of only small parts of the testimony of three witnesses, parts of a stipulation, and four memoranda. These cannot be considered persistent when it is realized that during the trial, which lasted two weeks, almost 20 witnesses testified and over 230 exhibits were admitted. Second, in *Continental Ore*, the Supreme Court clearly did not intend to take from a trial court the discretion to control the evidence in a given case. Rule 43 of the Federal Rules of Evidence in fact provides for the exclusion of evidence when its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence. See *Proposed Rules of Evidence for the United States Courts*, 51 F.R.D. 315, 345 (1971). A review of the matters of which petitioners complain will illustrate that, in this case, the trial court did not abuse its discretion and did nothing to substantially affect the rights of the parties.

Petitioners first complaint in this instance, however, actually goes to the accuracy of the Fifth Circuit's opinion and not to exclusion of evidence. They argue that the Fifth Circuit incorrectly found that petitioners' share of the El Paso market increased in 1971. They say it deceased and that respondents' charts and testimony at trial to the contrary were wrong. The applicable chart, however, did show an increase and it was admitted after being fully explained by a competent witness. (R. 491; Tr., Vol. III 1117-19, 1134). When the chart was admitted, petitioners did not

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object to it. They objected only to one other chart which related to net profits. (Tr., Vol. III 1134). Under the circumstances, they certainly cannot complain of the Fifth Circuit's opinion which is supported by a chart described by competent testimony and admitted without objection.

Petitioners also complain of the exclusion of evidence regarding respondent's early development in the cooler pad business. AMXCO had mergered with or acquired several companies before 1960. (R. 109-112). The mergers and acquisitions were not systematic as petitioners claim. The trial court excluded evidence of them. It noted as it excluded the evidence that petitioners had "brought a charge . . . involving price discrimination and attempt to monopolize" (R. 297). Consequently, the trial court was well aware of the allegations under Section 2 of the Sherman Act. It then observed that it would take the evidence up with petitioners later, indicating that they could make their offer of proof outside the presence of the jury in accordance with procedural rules. Fed.R.Civ.P. 43(c). In the interim, the trial court cautioned petitioners to "stay with what the suit charges, the acts they [respondent] did starting there, I guess in '68, or '69 or '70 or '71." (R. 298).

These directions indicated a full comprehension of both the pleadings and the evidence. For example, in petitioners' First Amended Complaint the allegations of wrongful conduct center around the activities of AMXCO in 1971. (R. 25). There are no allegations of wrongful conduct before 1968. Although in one paragraph petitioners set out respondent's general

method of operation, the allegations are clearly made for historical purposes only. Further, no allegations are found anywhere in the Amended Complaint which even infer an attempt to monopolize through acquisitions occurring in the 1950's. Finally, at no time during the trial did petitioners move to amend their pleadings to raise new issues. Fed.R.Civ.P. 15. Similarly, petitioners' proof centered on the activities of AMXCO in 1971, with some attention being given to events occurring as early as 1968.

In light of the pleadings and the evidence, the trial court correctly exercised its discretion by excluding evidence of mergers with and acquisitions of AMXCO occurring 10 to 15 years before the real disputes between the parties began. The same time limitations were used in *United States v. Maryland and Virginia Milk Producers Ass'n*, 20 F.R.D. 441 (D.C. D.C. 1957), when Judge Holtzoff, a respected scholar of federal procedure, established a 10 year "cut-off" date for discovery in connection with claims of restraints of trade and attempts to monopolize under sections 1 and 2 of the Sherman Act. He further observed that most courts acknowledged that longer time frames were needed in establishing "cut-off" dates in connection with claims of unlawful mergers under Section 7 of the Clayton Act. No such claims were present, however, in this case. Judge Holtzoff's views have been approved by other scholars and judges. *Manual for Complex and Multidistrict Litigation*, §4.30.

Petitioners complain of other exclusions but time and necessity dictate a response to only one. The particular exclusion was an instruction by the trial court

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to the jury to disregard an assertion by Manuel Gomez, a witness for petitioners, that one of AMXCO's employees told Gomez that AMXCO's purpose was "to put Vebco out of business." It is clear from the record, however, that Gomez could not identify the employee who made the statement and that this was the court's reason for instructing the jury to disregard the testimony which it had already heard. Petitioners incorrectly contend that identification was not necessary. For example, in *Northern Oil Co. v. Socony Mobile Oil Co.*, 347 F.2d 81 (2nd Cir. 1965), a lower court judgment was reversed because the district judge admitted the hearsay comments of an unidentified agent of the appellant. See also *Monticello Tobacco Co. v. American Tobacco Co.*, 197 F.2d 629 (2nd Cir. 1952), *cert. denied*, 344 U.S. 875 (1952).

The reason for the requirement of identification is obvious. The statement of a party opponent is normally admitted as an exception to the hearsay rule because the party as an opponent has the full opportunity to explain the former statement on the stand. McCormick, *Evidence*, §239 at 503 (1954). If a party such as a corporation, however, does not know which of its employees or agents made the statement, it simply does not have the full opportunity to explain the statement. Under the circumstances, it is clear that the exclusions were not an abuse of discretion. Petitioners had ample opportunity with other admitted evidence to show a specific intent to attempt to monopolize. The substantial rights of the parties were therefore not affected.

E. The Fifth Circuit correctly held that damage evidence occurring during the post complaint period should have been excluded under the circumstances in this case.

Petitioners claim that the failure of the trial court to admit damage evidence occurring during the post complaint period places this case in conflict with the Seventh Circuit decision in *A. C. Becken Co. v. Gemex Corp.*, 314 F.2d 839 (7th Cir. 1963). There is no conflict, however. In *Becken*, the Seventh Circuit merely held that the plaintiff was not precluded from recovering damages for losses incurred in the post complaint period. In this case, evidence of such damage was given to the jury for consideration. The Complaint was originally filed in 1971 and petitioners' expert testified as to damage for losses incurred in 1972. (Tr., Vol. III 861). Under the circumstances, there simply is no conflict.

Also under the circumstances in this case, the trial court properly excluded the post complaint evidence. One of petitioners' principals offered to testify about petitioner's profit figures for 1973. Respondent objected, however, because it had never received the information in intelligible form. It could not, therefore, verify in any way its authenticity. The trial court concurred that the matter was "new" and that it would be unfair to allow it into evidence. (R. 901). The decision below is consequently correct.

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F. The Fifth Circuit correctly held that the evidence supported a jury finding that respondent's price differences were made in good faith to meet competition.

Petitioners claim that no jury question was created as to respondent's affirmative defense that it met competitive prices in good faith. Substantial space was devoted to the facts in regard to this issue in the "Statement of the Case." They will not be repeated. Nor will the Fifth Circuit's opinion on this issue be summarized. The facts and opinion are too clear to necessitate reiteration. The Court of Appeals was correct beyond question because, rather than reaching a decision that conflicted with the Supreme Court decision in *A. E. Stalley Mfg. Co. v. FTC*, 324 U.S. (1945), it used the very standard dictated by the latter decision. The Supreme Court held that a price discriminator could establish the good faith defense by showing "the existence of facts which would lead a reasonable and prudent person to believe that the granting of a lower price would in fact meet the equally low price of a competitor." 324 U.S. at 760. The Fifth Circuit, using that standard, found the evidence justified a finding that competition was met in good faith. 517 F.2d at 726 (A. 22a).

III. The decision below does not sanction such a departure by the trial court from the accepted and usual course of judicial proceedings as to call for an exercise of the Supreme Court's power of supervision.

Petitioners complain that the trial court unfairly participated in the trial of this case and consequently

prejudiced their right to an impartial trial. They believe such conduct violated their right to a jury trial and requires the Supreme Court to exercise its power of supervision. They do not, however, attempt to judge the trial court's conduct by the applicable standards. When such standards are examined, it is clear the court committed no error in the conduct of the case. The Eighth Circuit has, for example, set out such standards in *Skogen v. Dow Chemical Co.*, 375 F.2d 692, 703-04 (8th Cir. 1967):

> It has been repeatedly said that a trial judge in the Federal Courts is more than a mere moderator or arbiter. He has the obligation, along with the necessary authority, to actively preside and conduct a fair and impartial trial, to rule out improper questions, and protect witnesses from overzealous cross-examination on collateral and personal matters, particularly where such questions shed no light on the issues involved or the credibility of the witnesses
>
> . . . .
>
> Since the law places the responsibility for the trial of cases in the hands of the trial judge, a large degree of discretion is essential in the conduct of that trial within a broadly defined framework. Among other things, the trial court had discretion on the admission of evidence, the extent of examination and cross-examination of witnesses, the conduct of trial counsel, the trial court's comments upon the evidence, and the order and proper presentation of the evidence. (Citations omitted.)

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Further, the trial court, in a complex case such as this one, had an obligation to try to bring some order and coherence to the mass of evidence presented to the jury. *Rayward v. Silbermann*, 356 F.2d 611 (2nd Cir. 1966). By commenting on the evidence and controlling the examination of witnesses, the court succeeded.

Moreover, any errors that might have been committed by the trial court were rendered harmless by its admonitions regarding its own rulings. *Maryland Casualty Co. v. Coker*, 118 F.2d 43 (5th Cir. 1941). In its charge, for example, the court said:

> Again, I will tell you, you are the exclusive judges of the credibility of the witnesses and the weight to be given their testimony. I have no intention of trying to express to you nor will I express to you any idea that I may have as to credibility of a witness or what testimony should be accepted. That is your exclusive province. If you think I have, you may disregard it because I have no intention of invading your rights and obligations in that respect. (R. 80).

Under the circumstances, the trial court's participation in the conduct of the trial was not an abuse of discretion.

Petitioners also complain that the trial court incorrectly excluded some of their evidence without objection during the trial. Failure to object by a party, however, does not preclude a trial court from excluding evidence on its own motion. In fact, when the

evidence is irrelevant, unreliable, misleading, prejudicial, or incompetent, a court should exercise its discretionary power to intervene. McCormick, *Evidence* §55 at 130 (1954).

Petitioners further complain that the trial court adversely commented on some of their evidence and left the jury with the impression that it was of no consequence. For example, petitioners object to the comments made by the court in regard to the testimony on crinoline supplies. In this instance, however, the court merely wanted to insure that petitioners did not divert the jury's attention to collateral matters involving the history of crinoline's use by both parties. Still, the court admitted the crinoline evidence, stating that "it speaks for itself." (R. 314). This was certainly not a prejudicial comment on the evidence.

Petitioners also complain that the court curtailed their examination regarding the surveillance of wood supplies by competitors. In particular, petitioners asked if one of respondent's employees knew of any specific instance when petitioners checked respondent's supplies. The court correctly curtailed these questions because, if the matter became an issue, respondent would then have been required to parade other employees to the stand to testify about such surveillance. Legitimate considerations of time precluded such a diversion. Further, testimony was already before the jury from Robert Case, president of a third-party competitor, Southwest Industries, that checking the wood supplies of competitors in the pad business was "a fairly common thing to do." (Tr., Vol. II 488). Consequently, the trial court's comment on this evidence was proper and appropriate.

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Petitioners give other examples which purportedly show the trial court incorrectly commented on the evidence. An examination of only one will suffice to indicate the invalidity of all. For instance, petitioners wanted to explore the freight rate costs of respondent because respondent had testified it could ship its pads cheaper than could petitioners. This condition existed, however, not because respondent received better rates than petitioners, but because its pads were not as thick as petitioners'. Consequently, if both parties had to ship their pads in box cars of the same size, more of respondent's pads could be shipped. Disregarding this very elemental fact, petitioners wanted to investigate matters of rate costs. The court correctly precluded such an investigation, explaining that there was "nothing complicated about" the contentions on rates. (R. 420). The obvious propriety of the court's actions is as clear on the other instances enumerated by petitioners as it is in this one.

Petitioners finally complain that the trial court intervened in petitioners' presentation of chart exhibit 19. They assert that the chart was prepared so that voluminous and complicated data could be presented in understandable form. They further assert that the court disapproved of the technique. Petitioners fail to understand, however, the problems presented by the chart.

The court admitted all charts that were introduced. Respondent, however, objected to the form of some of the charts, especially exhibit 19. For example, in one column, petitioners showed undiscounted sales by respondent to retailers. Since the column failed to dis-

count the sales, a very inflated figure was presented to the jury for those sales. Petitioners admitted the column was not "germane" and was "immaterial." (R. 249-50). By using large figures, however, the column had a potentially prejudicial effect on the jury which the court realized. Further, in one of its column headings, the chart indicated that respondent was making sales to petitioners' customers, although during trial one of the most hotly contested issues surrounded the question of which customers belonged to whom. The court recognized this problem and observed that the chart was "misleading" because "that's something the jury is going to have to decide." (R. 251). Finally, exhibit 19 used questionable discount rates for petitioners' sales, which rates again had a misleading effect on damage calculations. (R. 252-53). In light of these substantial flaws, the court correctly requested the chart be presented at a later time in the trial after additional evidence was presented. It is also interesting to note that, at trial, petitioners acquiesced in the court's request and made no objections. (R. 253).

The chart was then admitted when petitioners' expert testified. They complain, however, of the court's involvement in the examination of their expert witness. It is clear, however, that the court's involvement was necessary. The expert, an accountant, was predicting the sales volume petitioners should have had and could be expected to have. On the basis of cross-examination, it was apparent that the expert had no special knowledge of the industry. He could not name the competitors in the industry. (R. 357-60). He did not know the total capacity of the market. (R. 357-58). He did not know the relationship between cooler

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sales and pad sales. (R. 358-59). For comparison, see the testimony of L. R. Paschich. (Tr. Vol. II 482). He did not consider the weather to be a material factor in his opinion. (R. 360). For comparison, see the testimony of Robert Case. (R. 312-13). Finally, he could not even vouch for his predictions. (Tr., Vol. III 828-29). In light of these shortcomings, it is doubtful that the "expert" was actually qualified to testify. Compare *Callaway Mills Company v. FTC*, 362 F.2d 435, 444 (5th Cir. 1966). Respondent vigorously objected to this testimony and asked that it be stricken. The trial court overruled respondent's objections, but did attempt to negate the prejudicial effects of unfounded opinions on the jury.

The actions by the trial court were therefore proper in this case. They did not violate petitioner's right to a trial by jury. They were certainly not of the type or nature to require the Supreme Court to exercise its power of supervision.

CONCLUSION

For the foregoing reasons it is respectfully submitted that this petition for a writ of certiorari should be denied.

Respectfully submitted,

WILLIAM DUNCAN,
COUNSEL FOR RESPONDENT

PROOF OF SERVICE

The undersigned attorney of record for respondent, AMXCO, Inc., hereby certifies as follows:

(a) that I am a member of the bar of the United States Supreme Court, and that I have duly served all parties required by the Rules of said Court to be served with the foregoing Brief, as hereinafter shown;

(b) that the name and address of the attorneys of record for both the adverse parties are as follows:

Kenneth L. King,
P. O. Box 2900
El Paso, Texas 79999

(c) that on this day I served three printed copies of the foregoing Brief on Kenneth L. King by depositing same in the United States post office with air mail postage prepaid, properly addressed to said attorney for petitioners at their said address.

EXECUTED this ____ day of February, 1976.

_____

COUNSEL FOR RESPONDENT